Appendix "A"

CASES IN WHICH THE HOLDING-ON VESSEL HAS BEEN HELD IN FAULT FOR FAILURE TO TAKE TIMELY ACTION TO AVERT COLLISION.

The New York, 175 U. S. 182.

This was a case of collision between two steamers, the Conemaugh and the New York. It took place on the Detroit River. The Conemaugh was coming down the river, the New York up. Both were a little to the American side of the midline of the river. Between them was a tug with a line of barges crossing from the Canadian to the American side of the river. The barges were tailing out behind, and, with the tug, occupied two-thirds to three-fourths of the navigable channel, leaving only some 500 to 800 feet between the rearmost barge and the Canadian bank.

Both the Conemaugh and the New York signalled the Burlington that they would pass astern of her barges, that is to say, between the last of them and the Canadian bank, and the two steamers accordingly directed their courses toward the Canadian bank.

This put them on crossing courses, the Conemaugh having the New York on her starboard hand. Thus the Conemaugh was the giving-way and the New York the holding-on vessel.

Having signalled the Burlington that she would pass astern of her barges, the Conemaugh hard-a-starboarded, and then, as she picked up the rear barge, steadied and ported to follow the tow. At this juncture she discerned

the white and red lights of the New York coming up the river, and, as we have said, apparently a little on the American side of mid-channel. Three times successively the Conemaugh gave the New York two blasts, indicating that she would pass between the New York and the Canadian side, which meant crossing the New York's bow. None of these signals were answered by the New York. The New York, for her part, was also heading toward the Canadian shore. Thus both vessels were pointing toward intersection in the comparatively narrow space between the rearmost of the Burlington's barges and the Canadian bank. Except for last instant changes which were useless, both vessels held course without alteration of speed and collided astern of the Burlington's last barge.

Both were held at fault.* It was the Conemaugh's duty to keep out of the way, and she was condemned for not stopping when the New York failed to answer her signals, and, after temporarily porting when she picked up the Burlington's last barge, for then starboarding and thus attempting to cross the New York's bow.

The New York claimed that she did not hear the whistles of the Conemaugh or see her lights in time to avert the collision. Her plea was substantially that which is offered by the master of the Svea in this case: that she did not "realize" until too late that the burdened vessel was not going to give way. But the court applied the objective standard. The question was, not what her offi-

*It was in the Circuit Court of Appeals decision cited by petitioners (Svea Brief 21) that the holding-on vessel was exonerated. This court reversed and condemned her.

cers *did* see or hear, but what competent officers in their place *would* have seen or heard.

> "Her officers failed conspicuously to see what they ought to have seen, or to hear what they ought to have heard."

The court further found that the New York should have observed the Conemaugh closing in toward the Canadian bank in the narrow channel, and pointed out that the New York alleged in her answer that there was not room enough for any vessel to safely pass between her and the Canadian bank, and said:

> "But notwithstanding this, she kept her course toward that bank, and was thus constantly narrowing the channel through which the Conemaugh signified her intention of passing,"

and further said that she

> "ought to have known that if she continued her course a collision would be inevitable."

Thus the New York had received distinct indication that the Conemaugh was not going to get out of the way. Citing *The Sunnyside*, 91 U. S. 208, and *The Delaware*, 161 U. S. 459, the court held that a privileged vessel must depart from her primary duty to hold course when she receives distinct indication that the burdened vessel is not going to give way. The court said:

> "Her only excuse for her omission is that she was the preferred vessel within the 19th American and 16th Canadian rule, and that by the 23d American and 22d Canadian rule it was her duty to keep her course. *But the fact that a steamer is entitled to hold her course does not excuse her from inattention to signals,* from answering where an answer is

required, or *from adopting such precautions as may be necessary to prevent a collision, in case there be a distinct indication that the obligated steamer is about to fail in her duty.* As was said in the case of *The Sunnyside,* 91 U. S. 208, 222 *sub. nom. Miner v. The Sunnyside,* 23 L. ed. 302, 307: 'Cases arise in navigation where a stubborn adherence to a general rule is a culpable fault, for the reason that every navigator ought to know that rules of navigation are ordained, not to promote collisions, but to save life and property by preventing such disasters.' See also *The Delaware,* 161 U. S. 459, 40 L. ed. 771, 16 Sup. Ct. Rep. 516; *The Maria Martin,* 12 Wall. 47 *sub. nom. Martin v. Northern Transp. Co.* 20 L. ed. 255. Both the Canadian and American Codes provide that in construing and obeying these rules due regard must be had to all dangers of navigation and to any special circumstance which may exist in any particular case, rendering a departure from them necessary in order to avoid immediate danger." (Italics ours.)

It is suggested by petitioners (Svea Brief Appendix xiv; see also pp. 9, 10) that as *The New York* arose under the old rules and was under a duty to slacken speed or stop and reverse if necessary, it is not pertinent to our situation. The decision itself is the answer. The New York was held at fault not only for not stopping and reversing, and failing to answer whistle signals, but also for failing to observe the "special circumstance" rule when she had distinct indication of the failure of the burdened vessel. For the court first discusses her failure to apprehend the special circumstances and then says:

"There is *another rule* pertinent in this connection, namely, rule 21 American, and article 18 Canadian, that every vessel when approaching another vessel so

as to involve risk of collision shall slacken her speed, or if necessary, stop and reverse." (Italics ours).

The New York violated both rules, and, inasmuch as she violated the "special circumstance" rule, the case, we submit, is directly in point.

The Admiral Watson, 266 Fed. 122
(D. C., W. D. Wash. N. D.)

Collision in Alaskan waters near Ketchikan. Helgeland was privileged vessel, both under narrow channel rule and under starboard hand passing rule. Watson was burdened. Helgeland gave Watson one whistle when vessels were one-half to two-thirds of a mile apart indicating port to port passing proper under both of applicable rules, which Watson failed to answer.

Helgeland nevertheless continued course, her pilot attempting to justify this on the claim that he had the right of way and that the Watson would surely not attempt to cross his bow, especially as there was very little space over on his starboard side. Two whistle blasts exchanged at the last minute were immaterial as collision was then inevitable.

Watson clearly at fault, but Helgeland condemned also. The court said:

> "The Watson was not in her fairway. She was far to her port side of the channel, and she was clearly in the wrong. The Helgeland was the privileged vessel. It was duty of the Watson to keep in her fairway.
>
> Under all of the circumstances, was the Helgeland justified in continuing in her course and speed after

failing to get a response to her blast, and observing the approach of the Watson, being in doubt as to what the Watson would do? Pilot rule No. 1, art. 18, provides:

'If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle, the danger signal.'

The fact that a vessel is privileged, and entitled to hold her course, does not excuse her from adopting such precautions as may be required by statute, and necessary to prevent a collision. In The New York, 175 U. S. 187, at page 205, 20 Sup. Ct. 67, at page 74 (44 L. Ed. 126) the Supreme Court said:

'But the fact that a steamer is entitled to hold her course does not excuse her from inattention to signals, from answering where an answer is required, or from adopting such precautions as may be necessary to prevent a collision, in case there be a distinct indication that the obligated steamer is about to fail in her duty, as was said in the case of The Sunnyside, 91 U. S. 208, 222; "Cases arising in navigation, where stubborn adherence to a general rule is a culpable fault, for the reason that every navigator ought to know that rules of navigation are ordained, not to promote collisions, but to save life and property by preventing such disasters." See, also, The Delaware, 161 U. S. 459; The Maria Martin, 12 Wall. 31, 47.'

The master of the Helgeland must have known if he continued in his course a collision was inevitable. He did not give a danger signal, or stop her engines, or reverse. The Supreme Court in The New York, supra, 175 U. S. 207, 20 Sup. Ct. 75, 44 L. Ed. 126 said:

'The lesson that steam vessels must stop their engines in the presence of danger, or even of anticipated danger, is a hard one to learn; but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that these repeated admonitions must ultimately have some effect.'

From what has been said it is apparent that the Watson was grossly at fault. She was not in her fairway. She failed to answer the signal. She did not maintain a proper lookout. But her unlawful and negligent conduct did not justify the Helgeland to continue in a course the inevitable result of which was collision in violation of her statutory duty, when the course of the approaching vessel was uncertain or in doubt, and her first signal unanswered. The Wakena (D. C.) 262 Fed. 989. The primary purpose of rules of navigation, as said by the Supreme Court, is not to fix arbitrary rights of the road to vessels, but rather for the safety of life and property."

The Tenadores, 298 Fed. 740, (2nd C. C. A.).

The steamships Tenadores and Murillo came into collision in New York Harbor on a clear day under conditions most favorable for navigation. The vessels were on crossing courses; the Tenadores burdened; the Murillo privileged. The Tenadores blew two whistles, thus asking a right of way (to cross the Murillo's bow) which she was not entitled to ask and which required instantaneous assent if collision were to be avoided. The Murillo cross-signaled one whistle, thereby insisting on her primary right as the privileged vessel to hold course and speed. Judge Hough condemned both vessels: the burdened vessel for asking what she had no right to ask under circumstances demanding instantaneous acquiescence to be suc-

cessful at all; and the privileged vessel for refusing that assent and continuing her course and speed when "she could have avoided collision by yielding right of way to the other vessel." The Murillo "had no right to use her privilege to produce or assist collision." After condemning both ships on these grounds Judge Hough went on to announce the admiralty *rusticum judicium* to which we have referred in the body of the brief, holding that the presumption is mutual fault when a collision like this occurs on a clear day with both ships in full view of each other and neither impeded by other craft.

The George S. Tice, 287 Fed. 127 (2nd. C. C. A.).

This collision occurred in the narrow channel between Staten Island and the New Jersey shore. The tug Ashbourne was coming down southerly from Elizabethport toward Perth Amboy. The tug Rice was proceeding northerly or up channel. They were thus passing steam vessels in a narrow channel, each bound under the narrow channel rule to "keep to that side of the fairway or midchannel which lies on the starboard side of such vessel."*

The court found that the Ashbourne was in about midchannel, perhaps slightly nearer the New Jersey shore. But she had in tow about 25 light coal boxes, making six or seven tiers. The Tice contended that, as the vessels approached, these towed craft were substantially straight behind the Ashbourne so that there was no reason why

*"In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such vessel."
(Article 25 Inland Rules, 30 Stat. 101.)

the Tice with her tow of one vessel only should not pass in accordance with the rule up the starboard side of the channel between the Ashbourne and Staten Island. The Ashbourne asserted that her tow, under the wind's influence, and in the absence of any helper, was tailing toward Staten Island and visibly blocking for the Tice the whole starboard half of the channel. The court found that this blocking did take place at least before the Tice could travel from the Ashbourne's bow to the third tier of her tow. The Tice's claim and testimony that the blocking in occurred suddenly was overborne by other evidence and it was held that the Tice saw, or ought to have seen, in time that passing up to her starboard side of the channel was impracticable. On the port side between the Ashbourne and the New Jersey shore there was ample passing room.

No signals were blown. The Tice went up the starboard side, got squeezed in the narrowing space, grounded, was struck by a third tier boat of the Ashbourne's tow and was also run into from astern by her own (Tice's) tow.

The District Court held both vessels at fault. The Tice alone appealed and, in affirming, the Circuit Court of Appeals said:

> "The faults of the Ashbourne, in thus blocking the channel, in having no helper, and failing to call attention to the situation she had herself produced, are apparent and admitted. The Tice alone has appealed, and in effect insists on her right to pass port to port in this narrow channel. Of course that right existed, if she was entitled just then and at that place to pass at all. But over and underlying all the rules

of navigation is that rule of common sense, so often referred to, that no one has the right to run into collision. That one vessel is obviously at fault does not justify another in running down her or her tow; a navigator may see how wrong another is, yet he must still avoid collision, if he reasonably can. Here the Tice could have waited or gone to the other side; we do not and cannot say that either course was to be chosen and the other shunned; we do say that it was a fault unnecessarily to insist on the impossible, even if the impossibility was obedience to the starboard hand rule.

The court below was right in finding both tugs at fault, and the decrees are affirmed, with one bill of costs."

The Coamo, 280 Fed. 282 (2nd C. C. A.).

The Coamo was a freight and passenger liner; the Essex was a tug with a tow. They were approaching on crossing courses with the starboard hand rule applicable. The opinion of the Circuit Court opens with the familiar primary rules:

> "It is the duty of the privileged vessel to keep her course and speed until a departure is necessary to avoid immdiate danger; while the burdened vessel, when on a crossing course, 'so as to involve risk of collision', shall keep out of the way of the other."

The Essex was burdened but was under the delusion that she was privileged and therefore held her course and speed instead of taking steps to get out of the way. She was held at fault. Coamo, however, though the truly privileged vessel, was also condemned for not sooner realizing the position of danger created by the wrong action of the Essex and departing from her course and speed

to avoid immediate danger; also for doing the wrong thing when she, too late, *did* realize the danger. It ought to have been apparent to her that the Essex, holding course and speed, with her long tow of three barges, the second of them as far as 2500 feet astern, was failing in her duty to get out of the way. Judge Hough applied the mutual fault presumption referred to in the body of the brief (p. 33) in connection with cases of this character.

> "It is not disputed, nor disputable, that a more inexcusable collision has rarely been presented to any court. It occurred on a fair, clear day, in waters most familiar and then uncrowded, and between vessels which could without difficulty have seen each other for miles, and were (as to tug and steamer) full powered, fully manned, and in perfect repair. These are material facts in considering the probability of collision occurring without mutual fault."

The West Hartland, 2 F. (2d) 834 (9th C. C. A.).

The vessels (West Hartland and Governor) were on crossing courses at night on Puget Sound, but it was clear. The Governor was burdened. The West Hartland was privileged. The West Hartland gave the Governor a single blast signal, indicating, under the applicable inland rules, that she would hold her course and speed. The master of the West Hartland thought he was then about three-fourths of a mile away, but in fact the distance did not exceed 1500 feet. He had scarcely given the signal when he discovered that he could not carry out the proposed maneuver, so he immediately reversed his engines full speed astern without notice or warning. The Governor on her part, though the burdened vessel, held

course and speed, having mistaken the light of the West Hartland for a light on shore. When the one whistle blast was blown the Governor gave three whistles and reversed full speed astern.

The District Court found that if the West Hartland had maintained course and speed per her one blast signal and the Governor had reversed as she did, the collision would not have occurred; also that it would not have occurred if the Governor had continued on her course and the West Hartland had reversed.

Both vessels were held at fault. The Circuit Court of Appeals affirmed, but on other grounds. Judge Rudkin said:

> "But we think that the decision should be placed on broader grounds. Here two vessels collided on the broad expanse of Puget Sound, on a smooth sea, under a cloudless sky, where the lights on the vessels could be seen for miles. The excuse offered is that one of the navigators mistook the lights, and the other misjudged the distance. That there was culpable negligence on one side or both must be conceded. The fault of the Governor is not in issue here, and the excuse offered by the West Hartland is that she was the privileged vessel, and that it was the duty of the Governor to keep out of her way. This is true, in a measure, but the privilege is not an absolute one. As said by the court in The New York, 175 U. S. 187, 205, 20 S. Ct. 67, 74 (44 L. Ed. 126):
>
> 'Her only excuse for her omission is that she was the preferred vessel within the nineteenth American and sixteenth Canadian rule, and that by the twenty-third American and twenty-second Canadian rule, it was her duty to keep her course. But the fact, that a steamer is entitled to hold her course does not excuse her from inattention to

signals, from answering where an answer is required, or from adopting such precautions as may be necessary to prevent a collision, in case there be a distinct indication that the obligated steamer is about to fail in her duty. As was said in the case of The Sunnyside, 91 U. S. 208, 222: "Cases arise in navigation where a stubborn adherence to a general rule is a culpable fault, for the reason that every navigator ought to know that rules of navigation are ordained not to promote collisions, but to save life and property by preventing such disasters." * * * Both the Canadian and American codes provide that in construing and obeying these rules, due regard must be had to all dangers of navigation and to any special circumstance which may exist in any particular case, rendering a departure from them necessary in order to avoid immediate danger.'

For some considerable time before the collision, the master of the West Hartland was in doubt as to the course the Governor intended to pursue, and under such circumstances it was his plain duty to solve that doubt in favor of safety by giving a danger signal* or taking timely steps to avoid a collision before plunging his vessel into a position where a collision would be the natural, if not the necessary consequence. The Mauch Chunk, 154 F. 182, 83 C. C. A. 276; Yang-Tsze Ins. Ass'n v. Furness, Withy & Co., 215 F. 859, 132 C. C. A. 201; The Coamo (C. C. A.) 280 F. 282; The George S. Tice (C. C. A.) 287 F. 127; The Jason (D. C.) 288 F. 57.

*The West Hartland was under the Inland Rules, Article XVIII, Rule 3 of which provides:

"If when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam-whistle."

Had the West Hartland blown the danger signal in good season she would have of course corrected the Governor's misapprehension that her light was a shore light; thus giving the Governor an opportunity to perform her duty as the burdened vessel of getting out of the way. If the Governor were derelict the West Hartland would then have had indication of it in time to do something herself to avoid immediate danger.

In the Yang-Tsze Ins. Ass'n v. Furness, Withy & Co., supra, the court said:

'The loss of property for which a recovery is sought was due to a collision, on the high seas, in broad daylight and in clear weather, and with no other vessels about to embarrass or interfere with navigation. The two vessels involved were steamers, and therefore could be maneuvered more easily than any other kind of vessels. They were in plain sight of each other when miles apart. They nevertheless came into collision and with such force that one of them sank in a few hours, carrying down with her the entire cargo. *It is difficult to see how it all happened unless both vessels were in fault and failed to exercise reasonable care. Plain common sense constrains one to such a conclusion. To exonerate either of them under such conditions can be justified only if upon the closest scrutiny of the navigation of each vessel it can be discovered that one of them was free from all culpable blame.* We have examined the evidence in the case with care, and we have not been satisfied that either one of these vessels was free from fault. The vessels that navigate the high seas, and indeed vessels that navigate inland waters, intrusted with human lives and property of great value, must be held to the strictest standards of conduct, and when they fail to observe the requirements which the maritime law of the nation has prescribed, are to understand that they must abide the consequences.'

And in The Coamo, supra, the court said:

'It is not disputed, nor disputable, that a more inexcusable collision has rarely been presented to any court. It occurred on a fair, clear day, in waters most familiar and then uncrowded, and between vessels which could without difficulty have seen each other for miles, and were (as to tug and steamer) full powered, fully manned, and in per-

fect repair. These are material facts in considering the probability of collision occurring without mutual fault.'

In those cases the collisions occurred in the daytime while here the collision occurred at night, but notwithstanding this difference the vessels could be here seen through the darkness for miles and the collision was equally inexplicable and equally inexcusable."

The Devonian, 110 Fed. 588.

In this case the English steamer Devonian on a voyage from Liverpool to Boston, and the three-masted schooner Perry proceeding from Boston to Rockport, came into collision in Boston harbor. The weather was clear, the water smooth, the wind light from the southeast. The steamer entered a narrow channel which was temporarily partially blocked by a dredge which was deepening the channel. The temporary channel was only 300 to 500 feet wide and 2000 to 2500 feet in length. Just as the Devonian entered this channel she sighted the schooner coming out of a fleet of moored vessels and proceeding down the channel. She immediately stopped and reversed and sent a tug forward to get the schooner out of the way but without success. The schooner had previously sighted the steamer but had lost sight of her while tacking through the anchored fleet and did not see her again until she had entered the channel and the tug which had been sent forward by the steamer attracted attention by her whistle. The steamer could not maneuver to get out of the way in the narrow channel and the schooner could not stop. The schooner came on very slowly, drifting with the tide and struck amidships against the steamer's stem. Noth-

ing was done on the schooner until the last moment when the helm was put up without effect owing to the lightness of the wind. The steamer was clearly at fault for failing to keep out of the way. The schooner attempted to exonerate herself by asserting that she held her course as required by the rules. The court, however, held that the schooner should have known that the steamer was large and would have difficulty maneuvering in the narrow channel and was at fault for failing to take seasonable action to avert the collision. After discussing the faults of the burdened vessel, which failed to get out of the way, the court said (page 592):

> "The court has next to consider if the schooner also was at fault. She had no lookout. Her counsel contended that the want of a lookout did not contribute to the collision; that she kept her course, and that this was her only duty; but the privileged vessel has no right to keep her course with her eyes shut. The rule requiring a lookout is imposed alike upon the burdened and privileged vessel. The duty of the privileged vessel is to hold her course; the duty of the burdened vessel is to keep off that course. *But the privileged vessel is to hold her course, constantly observing the burdened vessel, in order to notice if the latter fails in her duty. When the failure of the burdened vessel becomes apparent, the privileged vessel must change her course as prudence commands.*" (Italics ours.)

The Jason, 288 Fed. 57 (D. C. S. D. N. Y.).

Here The Jason and The Westfield were proceeding from their respective anchorages in or near to Lynnhaven Roads, to join a convoy of 30 or 40 vessels that was forming in position for departure to Europe, outside of

Cape Henry. They came into collision on a clear day, with no complications of wind or tide, and each vessel held on without material change of course and speed until right in the jaws of the collision. There was considerable conflict in the testimony whether the Westfield was being overtaken or whether the vessels were on crossing courses. The court did not decide this question, but held both vessels in fault, saying:

> "Specific rules of the road are of course to be obeyed, and failure so to do usually brings about the imposition of liability. It is, however, also the law that neglect upon the part of one ship to observe a specific rule does not excuse another in dangerous proximity to the first from taking cognizance of the general prudential rule which requires that due regard must be had for any special circumstances which may render a departure from specific rules necessary in order to avoid a collision.
>
> As I see the case, there was a woeful failure of both vessels in this particular, and that, irrespective of whether the Westfield was being overtaken, or was on a crossing course, and herself bound to keep out of the way. As was held in The John H. Starin, 162 Fed. 146, 89 C. C. A. 170, there is no right of way on which a vessel is entitled to insist, when it is obvious that it will result in collision. There is much more authority to the same effect, and it is so well known to all of us as to make its citation unnecessary. Whatever may here have been the start of the trouble, and, as to that, one man's guess is as good as another's, each ship saw that the other was holding on to a course that would, in short order, bring about a collision. If one ship had the right of way, and the other was infringing on that right, it is a wonder the whistle did not protest the fact. When the usurpation of unentitled privileges was further

insisted upon, with danger becoming more imminent with every turn of the propellers, one captain shouted to an unseen officer upon a boat 150 feet away and allowed his precautionary measures to end with the shout. And upon the other ship not even a cry was raised. It seems to me it was high time for danger signals. Indeed, it was ripe for more than that; the moment had come for affirmative action in the way of stopping the ships. It was not taken until the last instant when the reversal of the Westfield's engines may perhaps have accelerated the collision. This may, or may not, have been the swerve of which the witnesses speak. If it was, it is quite possible that the angle of vision of the observers was such as to give the impression that the swerve was made by the Jason.

Be this as it may, I have made up my mind that each vessel fell so far short of its duty in the presence of an easily avoidable danger as to require that both be held at fault."

The Senator Rice, 223 Fed. 524 (2nd C. C. A.).

The tugs Senator Rice and Luzerne on crossing courses came into collision in New York Harbor. The Luzerne, with a carfloat lashed alongside, was crossing East River and bound from the New York to the Jersey side. The Rice, with a tow, was coming up river and was on the port hand of the Luzerne, hence the Rice was burdened and the Luzerne privileged. The situation involved risk of collision when it first developed. The Rice blew two blasts, indicating that she would continue on her course and pass the Luzerne starboard to starboard. The Luzerne answered with one blast, thus expressing her dissent to the Rice's proposal, and both vessels held course and speed until collision was inevitable. Both vessels were held in fault, the court saying:

"It seems to us that in view of the fact that the Rice had reason to believe, if, in fact, she did not know, that the Luzerne was destined for Jersey City as soon as she got straightened out, that the starboard-hand rule applied. The least the Rice should have done was to slow down, which she could easily have done in the ebb tide, and wait until the situation developed. This is equally true of the Luzerne and results in both parties being held negligent for not recognizing a dangerous situation and waiting until it developed sufficiently to enable them to navigate safely. Such a result seems to us to be the best solution of a collision which appears to have been due to the stubbornness of both parties. *That such a collision should have occurred in broad daylight at a time when there was nothing in the elements to interfere with navigation seems inexplicable. It is hardly possible that the stupidity or obstinacy of a single master could have produced such a result, and we think the collision was due to their combined action. Where property and life are at stake neither party should insist upon persisting in a course which is likely to result in disaster when the delay of a few moments will insure the safety of both.*" (Italics ours.)

Appendix "B"

REVIEW OF CASES RELIED ON BY THE SVEA.

These cases do not disturb the "distinct indication" doctrine. In some of them the holding-on vessel is exonerated either because there was no distinct indication until collision was inevitable or because the holding-on vessel took seasonable action when she received indication. In other cases the holding on vessel is condemned either because she took action without distinct indication or long before there was "immediate danger of collision", or in an occasional exceptional case like the *Orduna,* infra, negligently did exactly the wrong thing.

It will be noted that most of the cases involve either navigation in crowded harbors or the receipt of indication *in extremis;* thus putting them in sharp contrast with the case at bar where the Svea had long observation of the approach of the Newport in open waters.

For the English law the Svea cites in the Appendix to its brief *The Gulf of Suez,* 15 Asp. 328, *The Orduna,* 14 Asp. 574, and *The Byfoged Christensen,* 4 App. Cas. 669. In *The Orduna* the holding-on vessel, having indication, took action which, however, was condemned by four nautical assessors as negligent. In *The Gulf of Suez* the holding-on vessel, having indication, took timely and appropriate action and she was accordingly absolved of blame. In *The Byfoged Christenson* the adherence to primary duty by the holding-on vessel was approved because she had no distinct indication of dereliction by the

giving-way vessel. These cases are considered in the ensuing paragraphs.

No exception can be taken to these conclusions. But the English case most analogous on fact to the Newport-Svea collision is *Nautik v. Oostvoorne*, 6 Lloyds List 110. Our opponents dismiss it with the statement that it involved overtaking not crossing vessels (Svea Brief, Appendix XV). The statement is erroneous. The opinion finds crossing courses (though originally overtaking). The privileged vessel like the Svea stood on into collision and the opinion contains the best English exposition we have found of the difficult, *and* responsible, situation of a privileged master under such circumstances. This exposition is given at page 47, supra, of this brief.

The Orduna, 14 Asp. 574.

The Orduna was privileged and the Konakry burdened on crossing courses, though almost opposite. Both vessels held course and speed until they were only about a quarter of a mile apart. Then the Konakry ported and the Orduna starboarded, apparently at the same time. The Konakry did not signal her change of course. The excuse of the navigating officer of the Orduna for failing to hold his course and speed was that he assumed that it was not a case of crossing so as to involve risk of collision at all, because the Konakry had almost finished crossing his bow and he was therefore justified in starboarding his helm in order to give the Konakry a wider berth.

The court, however, held that vessels are on crossing courses until they have actually cleared. That is to say,

both when they are approaching the crossing and while they are crossing.

The opinions in the Court of Appeal all seem to assume that the Konakry's extraordinary action before she ported at a quarter of a mile was indication that warranted the Orduna in taking action, but condemned her because the four nautical assessors, two in the court below and two in the court above, agreed that the action she took showed "want of care and skill and proper seamanship." She starboarded and hard astarboarded, thus throwing herself directly across the line of the Konakry instead of reversing.

The Gulf of Suez, 15 Asp. 828.

The Gulf of Suez was the giving-way vessel and the Gustav the holding-on vessel. The Gustav was crossing the river Mersey. The Suez was coming up the river. The Gustav ported to counteract an ebb tide and twice gave single blast signals. She then steadied and held course and speed across the river. Some claim was made that these signals were misleading, but the evidence showed that the Suez was not misled and observed the Gustav continuing on a steady course. The Suez twice starboarded and blew two blast whistles, thus essaying to go across the bow of the privileged vessel. With these indications of dereliction on the part of the burdened vessel, the Gustav reversed and was found to have been practically still in the water when the collision occurred. She was held to have taken timely and appropriate action, which would have averted the collision had not the Suez, after stopping and slowing, gone full speed ahead again.

The Byfoged Christensen, 4 App. Cas. 669, 4 Asp. 201.

The passage quoted on pages IV-V of the Svea's Appendix emphasizes that the circumstances must be exceptional to warrant departure from course upon the part of the holding-on vessel. To this of course we take no exception. Our case is predicated on special circumstances. The passage quoted also points out that there was *no constat* at what particular time the master of the holding-on vessel ought to have come to a distinct conclusion that the other vessel was not about to obey the rule. Without distinct indication of dereliction upon the part of the giving-way vessel the holding-on vessel was of course not justified in departing from her prima facie duty. We have no quarrel with this law.

The Britannia, 153 U. S. 130.

The Britannia and the Beaconsfield came into collision off Governor's Island in New York Harbor. The Britannia was burdened and the Beaconsfield privileged. The Britannia coming in from sea rounded Governor's Island so closely that she had to go full speed ahead to avoid grounding. The Beaconsfield was bound out to sea, and the vessels sighted each other just as the Britannia was clearing herself from the threatened stranding and was putting on full speed. At this time the Beaconsfield was slightly off the Britannia's starboard hand. The vessels exchanged single whistle blasts, which signified an agreement that the Britannia would swing to starboard and pass astern of the Beaconsfield. On account of current and eddy conditions the Britannia's swing to starboard was delayed

and she was temporarily pulled off to port. The Beaconsfield then sounded another single blast, which still signified her expectation that the Britannia would pass astern, and, hearing no answer, put her helm hard aport and stopped and reversed. Collision resulted. If the Beaconsfield had held course the vessels would have cleared. Both vessels were held at fault.

The Beaconsfield attempted to excuse herself by asserting that the failure of the Britannia to go promptly to starboard made the situation one of special circumstances and justified her in stopping and reversing. The court held, however, that the pilot of the Beaconsfield was "well aware" of the condition of the current which delayed the Britannia and that the course of the latter vessel was "precisely what might have been anticipated," and held the Beaconsfield in fault for overlooking the effect of this current. The court said:

> "Her excuse, in application of Rule 24, is that the Britannia, after having signalled that she was going astern, did not appear to be doing so, and that this erratic behavior justified the Beaconsfield in stopping and reversing. But, as already stated, the pilot of the Beaconsfield was well aware of the existence of the counter current against which the Britannia had to contend in changing her course to the starboard, and if we are obliged to impute fault to the Britannia, in not having foreseen and provided against that current, so we must likewise blame the Beaconsfield for overlooking the effect of such current in delaying the movement of the Britannia to the starboard. The course of the Britannia was precisely what might have been anticipated, after her first and only fault, and did not, in our judgment, warrant the Beaconsfield in disregarding the injunctions of the twenty-

third rule, which, if obeyed, would have prevented the collision."

Here again we have the court applying the objective standard to the conduct of the master of the privileged vessel. The indications were that the Britannia would clear, and the fact that this particular master failed to take into account what he should have considered did not excuse him.

The Breakwater, 155 U. S. 254.

This collision occurred in the North River, New York Harbor. The vessels involved were the Pavonia, a ferry-boat, and the Breakwater, a steamship. The Pavonia was coming out from her pier on the New York side of North River to go across to the New Jersey side. The Breakwater was coming up the North River.

As she emerged from her pier the Pavonia blew the customary long blast. Thereupon the Breakwater blew one whistle, indicating that she was directing her course to starboard—in other words, proposing to pass astern of the Pavonia and between her and the New York pier line. The Pavonia answered with one whistle, establishing this understanding. Twice thereafter the understanding was confirmed by exchange of one-blast whistles. When she blew the first time the Breakwater stopped her engines; when she blew the second time she reversed them.

So far, therefore, from there being any indication that the burdened Breakwater was about to fail in her duty, *every indication* was that she was going to perform her

duty of keeping out of the way by passing astern of the Pavonia.

There was a northwest wind and an ebb tide. The effect of this wind and tide was to cause the Pavonia to sag down stream. To counteract this tendency as far as she could, the Pavonia went ahead at full speed under a hard-aport helm.

The Breakwater failed to pass astern of the Pavonia, and struck her.

There was, as we have said, manifestly no indication to the Pavonia that the Breakwater was going to fail in her duty; but, on the contrary, every indication that she was going to fulfill her obligation. In any event, however, the Pavonia could have done nothing better calculated to avoid the collision than precisely what she did. The court said that

> "her only safe course was to do exactly as she did—put her wheel hard aport and her engine at full speed."

Even, therefore, if there *had* been indication the Pavonia could not have been condemned, because, obviously, you can not hold a privileged vessel at fault when there is only one thing she can do to avert collision and she does it.

The Breakwater claimed, apparently apart from any question of indication, that the Pavonia ought not to have left her pier when a vessel was coming up stream, but this contention, which is not important for our purpose, was rejected. The contention that the Pavonia should

have reversed under the old rule that both steam vessels crossing so as to involve risk of collision shall if necessary slacken speed or stop or reverse, was also rejected —on the ground that that rule must be reasonably construed, and that to have reversed under the prevailing wind and tide conditions would only have increased the tendency of the Pavonia to sag down stream.

The Binghamton, 271 Fed. 69 (2nd C. C. A.).

Binghamton privileged. Sagua burdened. Vessels under starboard-hand crossing rule. Sagua went with unabated speed to point of collision. Her only indication other perhaps than holding course (and it does not appear for how long) that she was not going to fulfill her duty to get out of the way was a two blast whistle blown only 1000 feet from intersection when, as Judge Hough says, it was almost criminal for her to propose crossing the privileged vessel's bow. But even this late indication was not conveyed to the Binghamton because the latter blew the danger signal simultaneously and the Sagua's two whistles were blanketed. However, the Binghamton *did* reverse at that time and was of course excused. While reversing earlier might have averted the collision, she could not be condemned for not acting before she had distinct indication.

> "The statement or wording of the rule can no longer be questioned in this court. It is the duty of the privileged vessel to keep 'on her course until a departure is necessary to avoid immediate danger,' and the rule as to speed is the same as that regarding the course. Yang-Tsze Ass'n etc. v. Furness, 215 Fed. 859, 861, 132 C. C. A. 201, certiorari dismissed

242 U. S. 430, 37 Sup. Ct. 141, 61 L. ed. 409. The fact that subsequent events show that stopping and backing on the part of the privileged vessel would have avoided collision does not prove negligence. The Musconetcong, 255 Fed. 675, 677, 167 C. C. A. 5."

That the Binghamton is not in conflict with the other Second Circuit cases which we have discussed in the brief is evidenced by the following passage from

The Tenadores, supra, p. vii,

which held the privileged vessel in fault.

"Tenadores was the burdened vessel, under the rules, and her prime duty was to keep out of Murillo's way, while the latter had no right to use her privilege to produce or assist collision; the measure of her duty we last restated in The Binghamton, 271 Fed. 69, and see no reason to go over that ground again."

The Haida, 191 Fed. 623 (D. C. S. D. N. Y.).

Two yachts were involved, the Haida and the Natalie. The Natalie was burdened and was run into by the Haida. She claimed the Haida was at fault because she did not observe that the Natalie was going to fail in her duty to keep out of the way; that she should have noted this and taken steps to avert the collision. There was no distinct indication of this prospective failure upon the part of the Natalie. The Haida was herself burdened in respect to another vessel and "could not under these circumstances be expected to give the same attention as otherwise to the vagaries of other boats to which she owed no duty except after their own default."

The Chicago, 125 Fed. 712 (2d C. C. A.).

The Augusta, privileged, was coming up the North River. The Chicago, burdened, was a ferry boat crossing from the Jersey to the New York side. A third vessel, the ferry boat Fanwood, was also crossing. The Augusta gave single blast signals to the Fanwood which she met first and the Fanwood stopped and allowed the Augusta to pass. Then the Augusta observed the Chicago and signalled her by single blasts that she proposed to hold her course and speed and expected the Chicago to keep out of the way as the Fanwood had. The Chicago, however, got to within 400 feet of the point of collision before she saw the Augusta. Though burdened, the Chicago gave at this late time a two blast crossing signal and went full speed ahead in an attempt to cross the Augusta's bow. Collision ensued.

The Chicago was of course condemned. It was claimed that the Augusta should be condemned also for not reversing, instead of merely stopping, when she got the Chicago's two blast crossing signal; but that signal was given so late as to be almost criminal and it was held that if the Augusta committed error in not reversing instead of stopping, the error was only in judgment and *in extremis* and the Augusta was excused. She was entitled to leniency both because the indication was criminally late and because her attention had previously been distracted by the Fanwood.

The Cygnus, 142 Fed. 85 (2nd C. C. A.).

1. Cygnus burdened. Dimock privileged.

2. Dimock had come down East River, rounding the Battery and was coming up the North or Hudson River

to her pier on the New York side. Cygnus was crossing North River from the New Jersey side to the New York side. Cygnus had the Dimock on her starboard hand and they were on crossing courses.

3. Whistles blown. Cygnus blew two, Dimock answered one. Cygnus a second time blew two and Dimock again answered one. Cygnus "heard no other whistles, though there is little doubt that the Dimock blew a third one."

4. Cygnus clearly at fault, being the burdened ship and failing to keep out of the way. The explanation, on Cygnus' side, is that she supposed that by blowing two whistles before the Dimock answered with one she obtained the right of way. She did not.

5. Dimock not at fault. She got two blasts twice from the Cygnus and heard them, but she always answered with one signifying her intention to hold her course and speed as she was entitled to do as the privileged vessel.

6. The two blast signals did not constitute distinct indication from the burdened Cygnus to the privileged Dimock because they were given and their proposal rejected well before there was danger of collision. It was, as the opinion states, quite in order for the Cygnus to propose going ahead of the Dimock while there was still ample time for safe execution of that maneuver. When, however, the Dimock repudiated the proposal, the respective duty and obligation remained unaltered: the Dimock was to hold course and speed, the Cygnus to keep out of the way. The fact that the Cygnus nevertheless kept on

was no indication that she would not get out of the way in time; for the Cygnus was a paddle wheel ferry and could check her headway promptly. She did not do so because her navigator was under the erroneous impression that having been the first to signal she thereby obtained the right of way despite the Dimock's rejection. But the Dimock could not read the mind of the Cygnus and this impression was not conveyed to her.

The Musconetcong, 255 Fed. 675 (2d C. C. A.).

The hold-on vessel was exonerated in this case and properly. She rejected the two blast proposal of the burdened vessel to cross her course, waited briefly to see whether the burdened vessel would accept the rejection and seeing that she did not, took affirmative action herself by reversing to avert the threatened collision. She was entitled to reasonable latitude as respects time of action as she was navigating in a crowded harbor and the situation was confused by the proximity of two other vessels. The case is one of indication and seasonable action thereon upon the part of the privileged vessel.

The foregoing seem to be the cases principally relied upon by the Svea. We do not find in the other cases cited in her behalf anything to excuse a holding-on vessel for failure to take steps herself to avert collision once she has had distinct indication that the giving-way vessel is about to fail in her duty.

Supreme Court,
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CHARLES ELMORE

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1927

No. 146 and No. 173

HENRY WILSON, F. A. WILSON, W. T. WILSON, et al., *Petitioners,* vs. PACIFIC MAIL STEAMSHIP COMPANY, STEAMSHIP NEWPORT, her engines, boilers, tackle, etc., and J. MCKINNON, Master of said vessel, *Respondents.*	No. 146
PACIFIC MAIL STEAMSHIP COMPANY, Claimant of the STEAMSHIP NEWPORT, her engines, boilers, tackle, etc., and J. MCKINNON, Master of said vessel, *Cross-Petitioners,* vs. HENRY WILSON, F. A. WILSON, W. T. WILSON, et al., *Cross-Respondents.*	No. 173

BRIEF FOR CROSS-PETITIONERS IN CAUSE NO. 173

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Subject Index of Matter in the Brief.

	Page
TABLE OF CASES—TEXT BOOKS AND STATUTES CITED	iii, iv
REFERENCES TO THE OFFICIAL REPORTS OF THE OPINIONS DELIVERED IN THE COURTS BELOW	v
GROUNDS ON WHICH JURISDICTION OF THE COURT IS INVOKED	v
STATEMENT OF THE CASE	1
SPECIFICATION OF ERROR	4
PRELIMINARY STATEMENT	4
OUTLINE OF ARGUMENT	5
ARGUMENT	6
I. The Ruling that the Master of a Vessel, Although Not Personally Negligent, is Legally Liable for the Torts of His Subordinates is in Conflict with the Established Doctrine of *Respondeat Superior*	6
An Intermediate Servant is not liable for the Torts of Subordinates in the Absence of Personal Negligence	6
II. The Authorities Relative the Liability of a Ship Master for the Torts of Subordinates are in Conflict. Those Holding Him Liable, Although Free from Personal Fault, are Based Either Upon Fallacious Reasoning or Upon a Misconception of Previous Authorities	8
A. The Authorities Holding a Master Liable	8
(1) The Leading Case (*Denison v. Seymour*) is based on Fallacious Reasoning	9
(2) The Leading Text (*Story on Agency*) is based on a Misconception of Previous Authorities	10
(3) The Remaining Authorities are based either on *Denison v. Seymour*, or *Story*, or announce the Rule without Reasoning or Authority	18
B. The Authorities Holding the Master Not Liable	20

Page

III. Even If There Once Were a Possible Basis for Holding a Ship Master Liable for the Negligent Acts of His Subordinates, the Reason for such Harsh Doctrine Has Ceased to Exist and the Rule Should No Longer be Applied 25

A. The Considerations Which Conceivedly May Have Warranted the Imposition of Such Liability Are Not Present Under Modern Conditions of Ship Operation 25

B. The Reasons for the Rule Having Ceased, the Authorities Applying Should Not Be Followed. *"Cessante Ratione Legis, Cessat Ipsa Lex."* 31

Table of Cases—Text Books and Statutes Cited.

Table of Cases

Pages

American Annotated Cases, 1915 C, 103 and cases cited 7

Beardsley v. Hartford, 50 Conn. 529, 541 31
Blaikie v. Stembridge, 6 C. B. N.S. 894, 141 Eng. Rep. 703 (1859) 16, 21
Bowcher v. Noidstrom, 1 Taunt. 568; 127 Eng. Rep. 954 ..... 9, 10, 21
Brown & Sons Lumber Company v. Sessler, 128 Tenn. 665, 163 S. W. 812 7
Burke v. Clarke, 11 La. Rep. 206 18
Buel v. New York Steamer, 17 La. Rep. 541 ..... 8, 18

City of New York, The, 25 Fed. 149 ..... 8, 18
Clancy v. Harrison, (1878) 4 Vict. L. R. 437 25

Daret v. Gray, 12 La. Ann. 394 8
De Harde v. Magdalena, 24 La. Ann. 267 21
Denison v. Seymour, 9 Wend. 9, 11 N. Y. (C. L.) 515 ..... 5, 6, 8, 9, 16, 17, 18, 30

Everett v. U. S., 277 Fed. 256 29

Foot v. Wiswall, 14 Johns 304 ..... 8, 9, 10, 16, 18

Hall v. Smith, 2 Bing. 156, 130 Eng. Rep. 265 ..... 10, 21

Kennedy v. Ryall, 67 N. Y. 379 ..... 8, 18

LeBlanc v. Sweet, 31 So. 766 20
Lotty, The, 15 Fed. Cas. No. 8524 19

Purviance v. Angus, 1 Dall. 180 16

Rebecca, The, 20 Fed. Cas. No. 11619 ..... 17, 26

Stone & Cartwright, 6 Term. Rep. (Durn & East 411); 101 Eng. Rep. 622 7

Wilson v. Belvidere, 30 Fed. Cas. 106 No. 17,790 18

Text Books

Pages

Buckland—A Text Book Of Roman Law 14

Carver on Carriage of Goods by Sea, Sec. 47 19

11 *C. J.* 1172 ..... 8, 19

36 *Cyc.* 150 ..... 8, 19

Digest of Justinian, The, Lib. XLIV, Tit. VII, 5, 6 12

Emerigon—Essays on Maritime Loans, p. 271 15

Halsbury's Laws of England, Vol. 26, Sec. 771 23

Holmes, O. W. Jr.,—The Common Law, p. 16, p. 8 ff. 13, 14

Kay on Shipmasters and Seamen, Vol. 2, p. 1153 ..... 8, 19, 21

Kent—Commentaries, Sec. 161, footnote (b) 16

Marsden on Collisions at Sea, 8th Ed., p. 73 23

Mechem—Agency, 2nd Ed., Sec. 1643 7

Monro, Charles Henry—The Digest of Justinian, Vol. I, p. 294, Vol. II, p. 381 ..... 11, 14

Moyle, J. B.—The Institutes of Justinian, 4th Ed., p. 173 12

Moyle, J. B.—Imperatoris Justiniani Institutiones, 4th Ed. p. 539 12

Roccus, Manual of Maritime Law—Treatise on Ships and Freight, N. XL (Ingersoll) 13

Stair—Institutions of the Law of Scotland, Lib. I, Tit. XIII, Sec. 3; Lib. I, Tit. XII, Sec. 18 ..... 13, 15

Shearman & Redfield on Negligence, 6 Ed., Vol. 2, Sec. 246, p. 712 ..... 8, 19

Spencer on Collisions, Sec. 182 ..... 8, 19

Story on Agency, 7th Ed., Secs. 313-318; Secs. 458-460, p. 591; Sec. 36 ..... 5, 6, 8, 10, 11, 13, 14, 16, 18, 30

Statutes

9 Stat. at L. 635 31

23 Stat. at L. 57 31

24 Stat. at L. 80 31

27 Stat. at L. 445 30

R. S. 4283-4289 31

References to the Official Reports of the Opinions Delivered in the Courts Below.

Page

Opinion of the District Court for the Southern District of California: Southern Division:
The Newport, 2 F. (2d) 255 2

Opinion of the Circuit Court of Appeals for the Ninth Circuit:
The Newport, 15 F. (2d) 342 3

Grounds on Which Jurisdiction of the Court is Invoked.

This is a case in admiralty decided by the Circuit Court of Appeals for the Ninth Circuit, affirming in part the judgment of the United States District Court for the Southern District of California (238, 239, 249)*. The Opinion and Decree of the Circuit Court of Appeals were filed November 1, 1926 (249, 250). The judgment of that court is made final by provisions of the Judicial Code, (43 Stat. 936).

Cross-Petition for certiorari was filed January 28, 1927 pursuant to the statute providing for review in this court by certiorari of cases in which the judgment of the Circuit Court of Appeals is made final (43 Stat. 936). Certiorari was granted March 14, 1927.

*Numbers in parentheses refer, unless otherwise stated, to pages of the Record.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1927

No. 146 and No. 173

HENRY WILSON, F. A. WILSON, W. T. WILSON, et al., *Petitioners,* vs. PACIFIC MAIL STEAMSHIP COMPANY, STEAMSHIP NEWPORT, her engines, boilers, tackle, etc., and J. MCKINNON, Master of said vessel, *Respondents.*	No. 146
PACIFIC MAIL STEAMSHIP COMPANY, Claimant of the STEAMSHIP NEWPORT, her engines, boilers, tackle, etc., and J. MCKINNON, Master of said vessel, *Cross-Petitioners,* vs. HENRY WILSON, F. A. WILSON, W. T. WILSON, et al., *Cross-Respondents.*	No. 173

BRIEF FOR CROSS-PETITIONERS IN CAUSE NO. 173

STATEMENT OF THE CASE.

Cause No. 173 comes before this court on a cross-petition for writ of certioriari. Cross-petitioners are the

owner and master respectively of the steamer Newport. Cross-respondents are the owners of the steam schooner Svea. The Newport and the Svea were in collision some twelve miles off Point Buchon, California, on the morning of November 29, 1922. The Svea interests libeled and the Newport interests cross-libeled. The libel filed by the owners of the Svea was in rem against the Newport but joined as party respondents, not only her owners but also George (J.) McKinnon,* her master (2). The pleadings on behalf of the claimant and master of the Newport admitted fault, but denied the master's personal participation therein (30).

The District Judge held the Newport solely at fault and entered up a decree against her and her owner, Pacific Mail Steamship Company; also against Captain McKinnon (55). In the opinion of the District Judge (63, 2 F. (2d) 255) the question of the master's liability was not discussed, nor was there any evidence or finding that he was personally negligent.

The captain was an experienced shipmaster. He is now seventy-eight years of age; at the time of the collision he was seventy-three. He had been going to sea for fifty-eight years and had held master's papers for thirty years. He was rated commodore of the Pacific Mail fleet. This was his first collision (104).

The morning of the collision was bright and sunny; the sea calm and the wind negligible. No other vessels

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*Captain McKinnon was called "J." McKinnon in the Svea's original libel and that description has continued through the titles of the pleadings, etc., though "George" McKinnon is the correct name (33, 104).

were in sight. Captain McKinnon had left his duly licensed third officer in charge of the bridge and had gone below to his cabin (121) some twenty minutes before the collision (105). Glancing through a port in the lavatory just before the vessels came together he saw the approaching Svea and rushed to the bridge (122), but it was too late to do anything to avert the collision.

On appeal from the decree of the District Court (55) the Circuit Court of Appeals for the Ninth Circuit reversed that part of the judgment holding the Newport solely at fault and held the Svea in mutual fault with the Newport, but affirmed that part of the judgment holding Captain McKinnon personally liable (239, 249, 15 F. (2d) 342). The Court of Appeals accepted it that the evidence excused the master from personal negligence, but on the authority of certain state and District Court cases and text writers felt impelled (reluctantly, as we read the opinion) to sustain the proposition that the master of a vessel, although personally free from fault, is liable for the negligent acts of his subordinates.

The owners of the Svea filed a petition for writ of certiorari to review the holding of the Circuit Court of Appeals that the Svea was at fault with the Newport. Certiorari was granted January 30, 1927. These cross-petitioners asked certiorari on that part of the judgment holding Captain McKinnon personally liable. This cross-petition was granted March 14, 1927. On order of the court these two causes have been consolidated for hearing and argument. Separate briefs are being filed in Cause No. 146 on the question of the fault of the vessels. The

present brief in Cause No. 173 is confined to the question of the master's liability.

SPECIFICATION OF ERROR.

The Circuit Court of Appeals erred in deciding that Captain McKinnon was properly held liable for the negligence of the third officer of the Newport.

PRELIMINARY STATEMENT.

The point involves an important question of federal law which has not been, but should be, settled by this Court. The question is novel and has been rarely adjudicated. Notwithstanding the statements made in several American texts, that it is a settled rule peculiar to the mercantile law that a shipmaster is responsible for the negligence of all employed on board the vessel, examination of the books reveals a marked dearth of authority. We have found no decision of this Court, or of any Circuit Court of Appeals, passing on this question; only one District Court case, and only one case from an English court.

According to our search, there have been but ten cases which have definitely passed upon the question whether a shipmaster is subject to this exceptional rule of liability. Six of these have held that he is. Three of these six are from the New York State Court; one is a Federal District Court case; and two are Louisiana cases which

seem to us to be overruled. Of the four cases holding to the contrary, two are from Louisiana, one from the Court of Common Bench in England, and one from the Supreme Court of Victoria, Australia. The textwriters of this country generally state that the master is under this exceptional liability; the English textwriters are contra. Until this case, there have been no adjudications on this point, so far as we can find, since 1885.

OUTLINE OF ARGUMENT.

I.

The ruling that the master of a vessel, although not personally negligent, is legally liable for the torts of his subordinates, is in conflict with the established doctrine of *respondeat superior*.

An intermediate servant is not liable for the torts of subordinates in the absence of personal negligence.

II.

The authorities relative the liability of a shipmaster for the torts of subordinates are in conflict. Those holding him liable, although free from personal fault, are based either upon fallacious reasoning or upon a misconception of previous authorities.

A. The authorities holding a master liable.

1. The leading case (*Denison v. Seymour*) is based on fallacious reasoning.

2. The leading text (*Story on Agency*) is based on a misconception of previous authorities.

3. The remaining authorities are based either on *Denison v. Seymour* or *Story* or announce the rule without reasoning or authority.

B. The authorities holding the master not liable.

III.

Even if there once were a possible basis for holding a shipmaster liable for the negligent acts of his subordinates, the reason for such harsh doctrine has ceased to exist and the rule should no longer be applied.

A. The considerations which conceivably may have warranted the imposition of such liability are not present under modern conditions of ship operation.

B. The reason for the rule having ceased, the authorities applying it should not be followed. *"Cessante ratione legis, cessat ipsa lex."*

ARGUMENT.

I.

THE RULING THAT THE MASTER OF A VESSEL, ALTHOUGH NOT PERSONALLY NEGLIGENT, IS LEGALLY LIABLE FOR THE TORTS OF HIS SUBORDINATES IS IN CONFLICT WITH THE ESTABLISHED DOCTRINE OF RESPONDEAT SUPERIOR.

An Intermediate Servant is Not Liable for the Torts of Subordinates in the Absence of Personal Negligence.

We deem it to be settled law that an intermediate servant (or as he is sometimes denominated, intermediate superior employee or middle man or superior or interme-

diate agent or superior servant) is not liable for the negligent acts of a servant under him. The two parties who *are* liable for such negligence are:

First: The inferior servant because of his personal negligence;

Second: The owner or principal under the doctrine of *respondeat superior* because the work in course of which the negligence was committed was being done for his benefit.

The intermediate servant, in the absence of personal negligence, is not held.

This rule is so well settled that we merely refer in passing to the leading case:

> *Stone v. Cartwright,* 6 Term. Rep. (Durn & East 411); 101 Eng. Reprint Reports 622,

where Lord Kenyon said:

> "In all these cases I have ever understood that the action must either be brought against the hand committing the injury, or against the owner for whom the act was done; but it was never heard of that a servant who hires laborers for his master was answerable for all their acts,"

and to

> *Brown & Sons Lumber Company v. Sessler,* 128 Tenn. 665; 163 S. W. 812;
>
> *American Annotated Cases,* 1915 C, 103 and cases cited;
>
> *Mechem-Agency,* 2nd Ed., Sec. 1643.

Under the general and well established rule, therefore, judgment would not lie against the master of the New-

port. To sustain the judgment against him in this case it must be found that the case of a shipmaster is an exception to this general rule. Is it?

II.

THE AUTHORITIES RELATIVE THE LIABILITY OF A SHIPMASTER FOR THE TORTS OF SUBORDINATES ARE IN CONFLICT. THOSE HOLDING HIM LIABLE, ALTHOUGH FREE FROM PERSONAL FAULT, ARE BASED EITHER UPON FALLACIOUS REASONING OR UPON A MISCONCEPTION OF PREVIOUS AUTHORITIES.

A. The authorities holding a master liable.

The six cases to which we have hitherto adverted are:

Denison v. Seymour, 9 Wend. 9, 11 N. Y. (C. L.) 515 (1832);

Foot v. Wiswall, 14 Johns, 304 (1817);

Kennedy v. Ryall, 67 N. Y. 379 (1876);

The City of New York, 25 Fed. 149 (1885);

Buel v. New York Steamer, 17 La. Rep. 541 (1841);

Daret v. Gray, 12 La. Ann. 394 (1857).

There are also various text writers who lay down the same rule, such as

Story on Agency, 7th ed., Secs. 313-318;

Shearman and Redfield on Negligence, 6th ed., Vol. 2, Sec. 246, p. 712;

Spencer on Collision, Sec. 182;

Kay on Shipmasters and Seamen, Vol. 2, p. 1153;

36 *Cyc.* 150;

11 *C. J.* 1172.

We think it may properly be said that *Denison v. Seymour* is the leading case and *Story on Agency* the leading text recognizing the exception.

1. **The leading case (*Denison v. Seymour*) is based on fallacious reasoning.**

It is submitted that the reasoning of *Denison v. Seymour* is unsound. It is:

The master of a merchant vessel serves voluntarily; he may choose his own officers. If the owners insist on incompetent officers the master is at liberty to leave the service; therefore, having voluntarily taken the ship and approved of his subordinates, he is responsible for their negligence.

The result, we respectfully suggest, is a *non-sequitur*. It may be that the master should be responsible if he negligently employs or negligently approves the employment of incompetent subordinates; but there is no sound reason why he should be responsible for the negligent acts of a licensed officer not known to him to be incompetent.

Denison v. Seymour cites for its holding *Bowcher v. Noidstrom*, 1 Taunt. 568; 127 Eng. Rep. 954, and

Foot v. Wiswall, 14 Johns, 304.

The *Denison* opinion says that in *Bowcher v. Noidstrom*

> "*it seemed* to be taken for granted that the captain was liable, and in which case the court *seemed* to acknowledge the principle that the master was liable for the conduct of a pilot on board his vessel; but as that was an action of trespass, and the captain had done no act, they directed a non-suit." (The italicizing is ours.)

Reference to *Bowcher v. Noidstrom,* decided in 1809, shows that it is far from definite authority that the ship master is liable for the negligent acts of his inferior officers, and of this case Lord Justice Best said in *Hall v. Smith,* 2 Bing. 156; 130 Eng. Rep. 265:

> "In Bowcher v. Noidstrom (1 Taunt. 568) Lawrence, J. mentions the case of the captain of the 'Russell' man of war who was held answerable for the act of one of the lieutenants, who had command of the watch, in running down an Indiaman, whilst the captain was asleep in his cabin. When or by whom that case was decided I do not know; but it is supported by no other decision that I am aware of, and its authority is shaken by the judgment of the case in which it is cited."

Foot v. Wiswall, the other authority cited to the point in the *Denison* case, contains no discussion of the question.

2. The leading text (*Story on Agency*) is based on a misconception of previous authorities.

Story on Agency, 7th ed., Sec. 313, recognizes the general rule that the middle man is not liable for the tortious acts of an under servant. In Section 314 the learned author states that the case of a shipmaster is an important exception to this general rule and in Section 316 specifically asserts that a master of a vessel is personally responsible for a collision due to the negligence of a pilot. In Section 317 it is stated that this exception to the general rule is adopted in the maritime jurisprudence of the modern commercial nations of continental Europe, it having been derived from the same common source—

the Roman law. And in text and footnotes the writer refers to the Digest of Justinian and other ancient texts.

It is with deference that we venture to criticize Story. But we must respectfully submit that an examination of the Digest discloses that the statements therein do not support the proposition advanced by the text.

The portions of *The Digest* cited by the author all refer to the obligation of the *exercitor* of a ship in relation to the custody of goods belonging to passengers. And in each passage this obligation is considered in connection with the obligation of innkeepers* and stablekeepers** to the guests. It is said that each of these three classes, *exercitors* of ships, innkeepers and stablekeepers are responsible irrespective of fault to their passengers or guests for the safety of their goods.

Thus, Title IX of Book IV of *The Digest* is captioned

> "Seamen, Innkeepers, Stablekeepers to restore what they receive."***

The seventh section of Title IX clearly shows that the responsibility under discussion is that of the *exercitor* for the acts of seamen causing damage to goods of the passengers *committed on board the ship*:

> "ULPIANUS (on the Edict 18). The *exercitor* is bound to answer for the behavior of all his seamen,

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*cauponae.

**stabuli.

***_The Digest of Justinian._ Translated into English. Charles Henry Monro, Vol. I, p. 294, Cambridge, University Press, 1909. The Digest has explained what is meant by "Seamen" (nautae) in this connection and has given it the restricted meaning of *exercitor*. Dig. Lib. IV, tit. 9, Introd; Story, ibid, 392, n. 2.

whether they are slaves or free; and it is quite reasonable that he should be answerable for their behavior, as he himself employed them at his own risk. But he is only answerable where the damage is committed on board the ship; if it happens off the ship, even by the act of the seamen, he is not responsible. Moreover, if he gives notice beforehand that all the passengers are to look after their own goods, and that he will not be answerable for damage or loss, and the passengers agree to the terms of this notice, then he cannot be sued. 1. The action *in factum* referred to is for double damages. 2. If the seamen should do any damage to one another's property, this does not concern the *exercitor.*"

The Institutes of Justinian, Book IV, Title V, Section 3, also lay down this same rule of responsibility—again considering the *exercitor,* innkeeper and stablekeeper together:

"Similarly ship-owners, inn and stablekeepers are liable as on a quasi-delict for wilful damage or theft committed in their ships, inns or stables, provided the act be done by some or one of their servants there employed, and not by themselves; for the action which is given in such cases is not based on contract, and yet as they are in some sense in fault for employing careless or dishonest servants, their liability would seem to be quasi-delictal."

The Institutes of Justinian, Translated into English, J. B. Moyle, Fourth Edition, page 173, Oxford-Clarendon Press.* 1906.

See virtually the same passage in *The Digest,* Lib. XLIV, Tit. VII, 5, 6.

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*The original text is given in *Imperatoris Justiniani Institutiones,* By J. B. Moyle. Fourth Edition, page 539. Oxford, Clarendon Press, 1903.

And Mr. Justice Story himself, in a later portion of his work recognizes that the Roman law only applied the principle of *respondeat superior* in certain cases and states that:

> "Masters and employers of ships, innkeepers, and stablekeepers, were made responsible for the safety and due delivery of the goods committed to their charge;"
>
> *Story,* ibid, Sec. 458, 459, 460.

This liability of *exercitors,* innkeepers and stablekeepers was an exceptional responsibility placed only on these particular classes in connection with the custody of the property of their guests or passengers.

> "The true reason for this exceptional responsibility was the exceptional confidence which was necessarily reposed in carriers and innkeepers."
>
> *O. W. Holmes, Jr., The Common Law,* p. 16, Little, Brown & Co., Boston, 1881.

> "Is the owner of a ship liable for a theft committed on board? It has been decided that he is. For if a sailor or innkeeper receive any person with his goods, he seems to undertake that his vessel or lodgings shall be calculated for the purpose, and that everything shall be safely restored. He is answerable therefore, if a loss happen, or an injury be sustained, though without his fault."
>
> *Ingersoll's—Roccus, Manual of Maritime Law. Treatise on Ships and Freight,* N XL. Hopkins and Earle, Philadelphia, 1809.
>
> *Stair, Institutions of the Law of Scotland,* Lib. I, tit. XIII, 3; printed by the Heir of *Andrew Anderson,* Printer to Their Most Excellent Majesties, *Anno* D O M. 1693, Edinburgh,

and in footnote 1, p. 591, Mr. Justice Story himself says:

> "There are certainly passages in the Digest which make principals responsible for the faults and negligences of their agents and servants, beyond those specially pointed out in the Praetor's edict. *This responsibility seems, however, to have been limited to cases where the principal was guilty of some negligence in employing negligent and improper agents and servants.*" (Italics ours.)

As a general rule the only liability for the delicts of others at Roman law was noxal; their was no general principle of *respondeat superior.*

O. W. Holmes, Jr., ibid, p. 8 ff;

Buckland—A Text-book of Roman Law, p. 594, ff. Cambridge University Press, 1921.

Thus, even if *"exercitor"* were properly translated "shipmaster", we submit that the passages cited by Story do not support the proposition that a shipmaster is responsible to third parties (not passengers) for the torts of his subordinates. But Story is in further error. The *exercitor* is *not* the master of the vessel. The *exercitor* is the owner or owner *pro hac vice* of the vessel—not the shipmaster. This is clearly pointed out in the Digest.

Thus, *Ulpianus* (on the edict 28) in discussing the *exercitorian* action in connection with the rights of those who have entered into contracts with the master, says:

> "The term exercitor is understood to mean the person by whom all proceeds and payments are received, whether he is the owner of the vessel or he hired the vessel at a lump sum either for temporary use or altogether."
>
> Dig. Lib. XIV, tit. 1, 1. 15.*

*Monro—*The Digest of Justinian,* Vol. II, p. 381.

And further says:

> "People are allowed to choose whether they would like to sue the *exercitor* or the master."
>
> Dig., ibid., 17.

Likewise, *Emerigon* in his *Essays on Maritime Loans*, p. 271** states:

> "We call exercitor (a) the person who receives the freights and profits of a vessel. Whether he be himself the owner of the ship, or whether he has hired her from the owner for a time or forever,"

and in a footnote says,

> "(a) The Latin word exercitor cannot be rendered by an exactly corresponding word in our language; it answers to the French word *armateur* and means not only the actual owner of the vessel; but he who is in possession of her, whether for himself or for another; who has the care of fitting her out, and who acts as owner, though it may not be in his own right. . . ."

So, also, the passage cited by the author from *Stair's Institutes* points out the distinction between the *exercitor* and the master.

> "An *Exercitor* is he to whom the profit of vessels or ships, whether upon the Sea, Rivers or Lakes, belongeth; whether he be owner of the ship or have only hired the same; the Master of the Ship is he that hath the command thereof, who therefore may contract and borrow Money for Reparation of the Ship, or out-rigging thereof, or for the intertainment of the Mariners, or any other thing for the use of Voyage. And thereby not only the Master Con-

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**Philip H. Nicklin & Co. Baltimore, 1811.

tractor, but the *Exercitor* who constitute him is lyable."

Stair—Institutions of the Law of Scotland, Lib. I, tit. XII, Sec. 18.*

See also,

3 *Kent—Commentaries,* Sec. 161, footnote (b);
Story, ibid., Sec. 36.

Thus, Story's error is twofold. First, he assumes that the master is the *exercitor* in Roman Law; second, he assumes that the *exercitor* is liable for tortious acts of the crew. The master is not, as such, the exercitor and the liability of the exercitor (and, of course, of the master in any case in which he happens to be also exercitor) is limited to loss on the ship of goods of passengers after the manner of innkeepers and stablemen for loss of property in their custody.

There is nothing in the Roman Law cited by Story to sustain the proposition that a shipmaster is liable for a collision occurring through the negligence of one of his subordinate officers.

And when we come to examine the cases cited by Story, it will be seen that only *Denison v. Seymour* and *Foot v. Wiswall* support the statement of the text. The remaining cases involve liability arising out of contract or are cases such as *Purviance v. Angus,* 1 Dall. 180, where the master personally was at fault. This miscitation is commented upon by Willes, J., in *Blaikie v. Stembridge,* infra, where he says:

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*Story mis-cites this section as 28. There is no section 28 to this title.

> "However, upon examination of the authorities cited by the very learned author, we find that they are confined to cases of contract and of collision* (upon which latter subject the American decisions seem to have gone further than ours)."

In line with his statement concerning the Roman law, Story predicates this exceptional liability of the master principally on the ground that masters of ships, though the agents or servants of the shipowners, are treated "as in some sort a subrogated principal and qualified owner of the ship, possessing authority in the nature of the exercitorial power for the time being". We have shown, we think, that the shipmaster was not as such an *exercitor,* but merely had the power to bind the *exercitor* by his contracts.

There is, however, no doubt that in ancient times, the situation of a shipmaster was often quite different from what it is today and that he held a much more responsible position. He was often a part owner and "the head and acting partner in a commercial enterprise" (see *The Rebecca,* infra). In Chapter III of this brief we present the considerations which show we think that Story's basis for the exception is predicated on conditions no longer existent and that his premise accordingly fails. Story also says that the imposition of this personal liability on the master will tend to induce a superior watchfulness over the conduct of his subordinates; but that could be said of any middleman. Story relies on *Denison v. Seymour* and quotes extensively in a footnote

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*i. e.: *Denison v. Seymour.*

from the opinion in that case; but as we have already suggested, the decision in that case is a *non-sequitur* from the reasoning.

3. The remaining authorities are based either on *Denison v. Seymour* or *Story*, or announce the rule without reasoning or authority.

Foot v. Wiswall is in the last category. *Kennedy v. Ryall* relies on *Denison v. Seymour* and *Story*. The first Louisiana case, *Buel v. N. Y. Steamer*, relies on *Story* and on *Burke v. Clarke*, 11 La. Rep. 206. This latter case is not in point. It held that a master who was part owner was jointly and severally liable with his partner. *The City of New York*, 25 Fed. 149 (1885) is based on *Story* and apparently on that basis alone gives it as the general rule in English and American law that the master is liable for the tortious acts of his subordinates.

The Circuit Court of Appeals cited and quoted from *Wilson v. Belvidere*, 30 Fed. Cas. 106, Number 17790 (D. C. Pa. 1806) in support of their affirmance of the judgment entered against the master. This case, if good law, does not seem to us to be in point. It apparently holds that the entire personnel of the vessel must contribute, by deduction from and in proportion to, their monthly wages to make up for cargo lost by the negligence of any of them—except that those who remonstrate in advance against the negligence will not be thus required to contribute. There is no suggestion in the case of the right of any third party damaged by such negligence to sue non-negligent members of the ship's complement, nor is there any suggestion that each mem-

ber of the ship's personnel may have a judgment rendered against him for the entire loss. The language quoted by the Circuit Court of Appeals in its opinion in the case at bar should be read in context with the opinion in the *Belvidere* case. So read the above mentioned distinctions appear at once and it also becomes plain that the Pennsylvania District Court was not dealing with the question of the master's contributory liability alone but of the contributory obligation of the entire personnel of the ship, master, officers and crew included.

Examination of other texts which recognize the exception to the general rule,

Shearman & Redfield on Negligence, 6 Ed., Vol. 2, Sec. 246, p. 712;

36 *Cyc.* 150;

11 *C. J.* 1172;

Spencer on Collisions, Sec. 182;

Kay on Shipmasters and Seamen, Vol. 2, p. 1153;

discloses that they are substantially based on *Story* or the other authorities we have reviewed, or, on other cases not in point such as those involving the master's liability on contract.* For instance, Spencer cites only *The Lotty,* 15 Fed. Cas. No. 8524 (1846) in his support. In that case the master was personally negligent, in suffering his vessel to remain inadequately moored in the face of an approaching and increasing storm of which he had ample warning. *Kay on Shipmasters,* cites only one au-

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*It should be noted that cases involving the master's liability for damage to cargo where he has signed bills of lading as master and not as agent, are not in point. In such cases he makes himself personally liable in contract. See *Carver on Carriage of Goods by Sea,* Sec. 47.

thority, *Blaikie v. Stembridge* (which we discuss infra) and this case in support of the statement that the law of England is probably contrary to the statement of the text.

Thus, even were there no contrary authority, it would seem doubtful in view of the few decided cases and the courts from which they issue, whether the statements found in the texts to the effect that this is the settled law are warranted. And there is contrary authority.

B. The authorities holding the master not liable.

The two Louisiana cases above referred to are overruled, we think, by the case of

Le Blanc v. Sweet, 31 So. 766 (La.).

In this case a passenger on a steamboat was drowned in disembarking. She was attempting to get into a skiff and the officers of the vessel negligently failed to stop the vessel before allowing her to disembark. The suit for the death was brought against the owner of the vessel and also the master. The master was not personally negligent. The court relieved him from liability, saying:

> "As to the defendants, it appears that the boat belonged to Daniel E. Sweet, and that Henry L. Sweet occupied the position of master and engineer. Under these circumstances we find no reason for holding the latter liable."

The headnote of the case (by the Court) reads:

> "Where an action in damages is brought against the owner and also the master of a steamboat, and it appears that in the transaction out of which the action arose the master was acting in his representative capacity, the owner alone is liable."

To the same effect is

De Harde v. Magdalena, 24 La. Ann. 267,

where, in discussing the liability of a master, the Court said:

> "One agent ought not to be held responsible for the fault of another although the principal or owner of the vessel may be responsible for the fault of either."

The law of England is assuredly contrary. We have already adverted to the criticism of *Bowcher v. Noidstrom* by Lord Justice Best in *Hall v. Smith,* 2 Bing. 153 (p. 10, supra) and to the reference in *Kay to Blaikie v. Stembridge,* 6 C. B. N. S. 894, 141 Eng. Rep. 703 (1859).

In

Blaikie v. Stembridge

Willes, J., plainly intimates his disapproval of the statements in *Story.*

Here The Gundreda was chartered to one V. K. Gallard. The charter party provided "stevedore for outward cargo to be appointed by charterer, but to be paid by and to act under the captain's orders." The charterer appointed a stevedore who went on board and commenced loading. The captain gave no orders but contented himself with seeing that the cargo was stowed in consonance with the ship's safety. During the loading some cargo was damaged due to the stevedore's negligence and this action was brought against the captain for the loss. The captain was held not liable, the Court saying:

> "Upon these grounds, it appears to us, *that unless the plaintiffs can establish some peculiar and ex-*

ceptional rule of liability with respect to the master of a ship, the defendant is entitled to the verdict; and, indeed upon the argument, it was contended that such a rule did exist. The authorities relied upon are, however, in our opinion, inapplicable. With respect to the case of *Morse v. Slue,* 1 Vent, 238, etc., it was founded upon a contract to carry goods actually delivered to and in the custody of the master on board the ship; and he was bound, as he would have been here if a bill of lading had been given for the injured pans, to deliver the goods in the state in which he received them, except prevented by the act of God or the Queen's enemies, or other expressly excepted peril. Accordingly, in Abbott on Shipping, part 2, ch. 2 (10th edit.), p. 91, referring to *Morse v. Slue,* the law is laid down as follows: 'It is true that the master also is answerable for his own contract; for, in favor of commerce, the law will not compel the merchant to seek after the owners and sue them, although it gives him the power to do so, but leaves him a twofold remedy, against the one or the other.' Another authority relied upon was Story on Agency, Secs. 314-318, in which it is stated that the case of masters of ships is an exception to the rule previously laid down as to the nonliability of agents to third persons for the negligences and omissions of duty of themselves and their sub-agents. And it is there laid down that 'this liability founded upon the doctrine of the maritime law, which treats the master not merely as an agent contracting on his own behalf as well as for the owner; but which, upon a broader policy, treats him as, in some sort, a subrogated principal, and qualified owner of the ship, possessing authority in the nature of the exercitorial power for the time being. And his liability founded upon this consideration extends not merely to his contracts, but to his own negligence and nonfeasances and misfeasances, as well as to those of his officers and crew. His responsibility for the officers and crew has this additional reason for its

support, that he is thus induced to exercise a superior watchfulness over their acts and conduct; and, if he were not so made liable for their acts and conduct, he might often, by his connivance in their frauds, misfeasances, negligence, or nonfeasances, subject the shippers of goods, as well as the owners of the ship, to great losses and injuries, without their having any adequate redress. The policy of the maritime law has, therefore, indissolubly connected his personal responsibility with that of all the other persons on board, who are under his command, and are subjected to his authority.'

However, upon examination of the authorities cited by the very learned author, we find that they are confined to cases of contract and of collision (upon which latter subject the American decisions seem to have gone farther than ours); and, after a diligent search, we have not found any authority for the position that a person sending goods to be loaded on board a general ship is entitled to assume, without inquiry, that his goods are to be shipped and stowed by the master, rather than by a stevedore, and so, without any contract with or wrong done by the master or crew, to insist upon holding the master liable."

Here then is a square holding that there is not any general rule of peculiar and exceptional liability placed on a shipmaster as distinguished from any other intermediate servant. And we do not apprehend that it can be seriously argued that torts resulting in collision should be placed in a peculiar class of their own, with different rights and liabilities than those flowing from other torts.

In Volume 26 of *Halsbury's Laws of England*, at page 526, Section 771, on the liability of the master in the chapter on collision, reads:

"The master is liable for damage arising from his own negligence or breach of contract made with the owner of cargo shipped on his vessel; but he is not liable for the damage done by an act of the crew or of the pilot, whether done in the course of their duty to the shipowner or not, unless ordered by him."

In the chapter on Liability for Collision, the 8th Edition of *Marsden on Collisions at Sea,* page 73, opens with the following passage, citing in footnotes with obvious disapproval *Story* and *Denison v. Seymour,* supra:

"The person primarily liable in damages to the sufferer by collision is he by whose negligent act the loss was occasioned. The shipowner navigating his own vessel, the master, mate, pilot or other person in charge of the ship, who gave a wrong order to the helm, the helmsman who directed the ship's course wrongly, the seaman on the lookout who negligently failed to see and report the approach of the other vessel, may all be sued as wrongdoers, and are liable for damages.

Thus when an action was brought against a pilot on board a King's ship for injury to the plaintiff's ship by the King's ship, it was held by Lord Kenyon that, though the pilot might be obliged to act in obedience to the order of the lieutenant in command of the King's ship, yet the pilot would be liable, if the collision happened by his personal misconduct. Upon proof, however, that the collision occurred by reason of an alteration of the helm ordered by the lieutenant, the plaintiff was non-suited.

It has been said that the master is liable for the negligent and wrongful acts of his crew as well as for his own acts. His liability as carrier, unless specially limited, may extend so far, but in no reported case has he been held liable in tort for wrongful acts of the crew. For wilful injury to

another ship by pilot or crew he clearly is not liable."

In *Clancy v. Harrison* (1878) 4 Vict. L. R. 437, the Supreme Court of Victoria held that a master of a ship is not liable for injuries occasioned by the negligence of the crew. In the *Per Curiam* decision the Court said:

> "Conceding that there was evidence of actionable negligence by anyone, the defendant is not answerable for the negligence of another fellow servant, even if the owners themselves would have been liable; in any aspect there was no evidence to go to the jury."

To recapitulate: There are three cases in one state, New York, and one Federal District Court case holding a master liable under these circumstances. The authorities, in Louisiana, England and Australia are *contra.* We think it may be properly said that the statements in *Story* and the other American texts as to the law on this subject are unwarranted.

III.

EVEN IF THERE ONCE WERE A POSSIBLE BASIS FOR HOLDING A SHIPMASTER LIABLE FOR THE NEGLIGENT ACTS OF HIS SUBORDINATES, THE REASON FOR SUCH HARSH DOCTRINE HAS CEASED TO EXIST AND THE RULE SHOULD NO LONGER BE APPLIED.

A. The considerations which conceivedly may have warranted the imposition of such liability are not present under modern conditions of ship operation.

It will be noted that the principal basis for Mr. Justice Story's statement was that masters are treated "as in

some sort a subrogated principal and qualified owner of the ship, possessing authority in the nature of the exercitorial power for the time being."

Assuming that this statement was once true, it does not hold good of present day conditions. Even in Story's time it had been judicially recognized that ships were being operated under radically different arrangements. Thus in 1831 (Story's work was published in 1839) Judge Ware of the District Court of Maine in the case of

The Rebecca, 20 Fed. Cas. No. 11619,

had before him the question of whether a vessel was liable, in specie, to answer for the loss or damage, by the fault of the captain, of goods which were taken to be transported on freight. Judge Ware made an exhaustive search of the codes and ordannances of the maritime law regarding the relationship of the master of the vessel and its owners. In the course of his discussion he made the following observations directly pertinent to our problem:

> "The custom which exempted the owners from personal responsibility for the acts of the master, extended, as has been observed, as well to obligations arising ex contractu as ex delicto. No distinction was made between them, and on the principles upon which the custom stood in its origin and in the time of the Consulate of the Sea, there does not appear to be any just ground for a distinction. The master, who was, in point of fact, ordinarily, if not always, a part owner, was considered as the head and acting partner in a commercial enterprise, and not as the agent of the owners of the vessel, and merchants dealt with him and trusted him in that character. And this was the character which the maritime legis-

lation and jurisprudence of the times attributed to him. But since the age of the Consulate, a great revolution has taken place in the state of civil society, and the reasons of public policy, in which the custom originated, have, in a great measure, ceased to exist. In consequence of the increased facilities of communication between nations, the greater security of maritime commerce, the vast augmentation of commercial capital, and the elasticity and vigor communicated to maritime adventures by the invention of the contract of insurance, extensive commercial enterprises are brought within the means of individual capitalists, and the union of a number of fortunes has become unnecessary for the carrying on of commercial operations with safety and success, even upon a large scale. During the same period, a gradual and silent change has been operated in the relations of maritime commerce. *The character and authority of the master of a vessel has fallen from that of the chief and the acting and responsible head of a maritime adventure, to that of the stipendiary agent or praepositus of the owners of the vessel. This change in the character of the master, should naturally be followed by a corresponding change in his authority and liabilities.*

It is a rule of natural law, incorporated into every system of jurisprudence, that the contract of an agent, acting in the name of his principal, and within the limits of his authority, binds the principal, but does not, unless he exceeds his authority, bind himself. The contract of the agent is the contract of the principal, entered into through the medium and instrumentality of the agent. It is, therefore, directly binding upon him, as his own contract. It is also obligatory upon him on the principles of natural equity. He has the benefit of the contract, and in justice ought to bear its burden. But as the agent contracts in the name of another, and derives no personal advantage from the contract, there is no reason for holding him personally bound to fulfill its ob-

ligations. Looking upon the master of a vessel, therefore, as the simple agent of the owners, acting in their name and for their benefit, upon the plainest deductions of reason, as well as upon the principles of natural equity, his contracts, within the legitimate scope of his authority, ought to be personally binding on the owners, and, for the same reasons, they ought not to be personally obligatory upon himself. *A just application of principles to the altered relations of the master to the owners, will reverse the ancient custom as to their liabilities.*" (Italics ours.)

If the foregoing observations are true of conditions in 1831 how much more applicable they are to conditions today. It may possibly be (although we doubt it and doubt whether it ever was the law) that in earlier times, when masters of vessels were often part owners; when a vessel would leave its home port to trade in all parts of the world for several years without return, that it was proper to hold the master personally responsible for the negligence of his inferiors. But times had changed by 1831. At that time it was recognized that the master had become only the stipendiary agent of the owners of the vessel.

Today it is a matter of common knowledge that he is rarely even that. The day of the tramp steamer and trading vessel is practically gone. As a general rule vessels have regular routes and regular ports of call. This was the situation of the Newport. Steamships are owned in the main by large corporations; port captains employ the officers; officers and clerks on shore supervise the receipt and discharge of cargo and pay the bills in connection therewith. The master today is little more than a navigator.

Judge Neterer of the District Court in Washington has recently commented on the changed situation of the master of a vessel in

Everett v. U. S., 277 Fed. 256.

This was an action by seamen against the master of the vessel on which they had signed articles. The form of articles which must be signed is prescribed by Section 4612, R. S.; Schedule, Table A. Under this form the master personally contracts to pay the seamen their wages. The court deprecated the statutory necessity for holding the master liable and expressed a strong opinion relative the injustice of the situation, saying:

> "Under the shipping articles the master is obligated to pay the wages of the seamen. This is an extreme hardship, brought on by no fault of the master. It is a liability which was not contemplated by either the master or the seamen. The master lost his earnings on the voyage, he could not even participate in the proceeds of sale of the vessel, and now to be adjudged liable for the unpaid wages of the seamen will take from him all his savings, and the provision made for the education of his children, and leave his family destitute, except such exemptions as are given by law to the head of a family. The form of article is provided by section 4612, R. S., 'Schedule' 'Table A' (Comp. St. Sec. 8392). This form was adopted when the relation of the master to the ship and to the owner was very different from that of the present time. The reasons for this stipulation, it would seem, do not obtain in the modern shipping world, and a change should be made, but it cannot be made by the court."

The District Court in the foregoing case was forced to hold as it did because the statute admitted of no other decision. This court is under no such compulsion in the

present instance. No statute is involved. The few authorities (none recent) which have passed on this question are in conflict. Even if it can be said that the decisions pronouncing the old harsh doctrine are preponderant, they do not issue from courts which would warrant this court in following them for any reasons of comity or the like. Nor have any rights in property become fixed which might justify the further promulgation of an unsound and cruel rule.

And if there ever were a valid reason for the doctrine announced by *Story* and *Denison v. Seymour* we submit that it is now non-existent. The day has long since gone by when, in the words of *Story*, a master of a vessel is "a sort of a subrogated principal and qualified owner of the ship." As a master is not an owner, or a "qualified owner", we submit that the principle of *respondeat superior* should not be applied to him.

It seems to us that it would be a very harsh doctrine that would hold the modern salaried shipmaster liable for tortious acts of the subordinate ship's officers where the master himself has not been negligent. It is plainly impossible for a shipmaster to be always on the bridge, and he can never be in the engine room. If the ruling of the Circuit Court of Appeals is upheld every shipmaster is faced with the prospect of having his life's savings swept away by the negligent act of a subordinate while he is properly asleep in his cabin. His liability will be greater even than that of the shipowner inasmuch as the latter has the benefit of the Harter Act* and the

*Act of Feb. 13, 1893, Ch. 105, Sec. 3, 27 Stat. at L. 445, U. S. Comp. Stat. Ann. 1916, Sec. 8031.

limited liability statutes** and the shipmaster has not.

B. The reasons for the rule having ceased, the authorities applying it should not be followed. "Cessante ratione legis, cessat ipsa lex."

Entirely apart from the authorities recognizing the changed status of a shipmaster, it is a matter of common knowledge that a master today is merely a principal servant of the owner of the vessel. No reason exists today (if it ever existed) for making his case an exception to the general rule of non-liability of intermediate servants.

> "It is a well settled rule that the law varies with the varying reasons on which it is founded. This is expressed by the maxim, *'cessante ratione cessat ipsa lex'*. This means that no law can survive the reasons on which it is founded. It needs no statute to change it; it abrogates itself. If the reasons on which a law rests are overborne by opposing reasons, which in the progress of society gain a controlling force, the old law, though still good as an abstract principle, and good in its application to some circumstances, must cease to apply as a controlling principle to the new circumstances."
>
> *Beardsley v. Hartford*, 50 Conn. 529, 541.

It is respectfully submitted that the judgment against cross-petitioner McKinnon should be set aside and that cross-petitioners should have their costs in this Court and in both courts below.

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**R. S. 4283-4289, 9 Stat. at L. 635, R. S. 4289, 24 Stat. at L. 80, Act of June 26, 1884, C. 121 par. 18, 23 Stat. at L. 57 (U. S. Comp. Stat. Ann. 1916, Secs. 8021-8028).

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1927

Nos. 146 and 173

HENRY WILSON, F. A. WILSON, W. T. WILSON, et al.,
Petitioners,

vs.

PACIFIC MAIL STEAMSHIP COMPANY, STEAMSHIP "NEWPORT", her engines, boilers, tackle, etc., and J. McKINNON, Master of said vessel,
Respondents.

No. 146

PACIFIC MAIL STEAMSHIP COMPANY, Claimant of the Steamship "Newport", her engines, boilers, tackle, etc., and J. McKINNON, Master of said vessel,
Cross-Petitioners,

vs.

HENRY WILSON, F. A. WILSON, W. T. WILSON, et al.,
Cross-Respondents.

No. 173

BRIEF FOR CROSS-RESPONDENTS IN CAUSE NO. 173.

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Subject Index

(Outline of Argument)

Page

I. The question submitted by cross-petitioners for the review of the court is not a true issue of the instant case 2

A. The record fails to show that the master was free from negligence 3

B. The record contains affirmative evidence of negligence of the master..... 5

a. He left the bridge when a vessel approaching on a crossing course was in sight..... 5

b. He delegated the navigation, when the danger of collision was momentarily increasing, to a subordinate whom he knew to be inexperienced and therefore should have known to be presumably incompetent 6

C. The record fails to identify the admitted fault of the ship with any negligence of the subordinate.. 8

a. The record does not show any specific negligence of the third mate..... 8

b. Assuming negligence on the part of the third mate, there is no evidence that such negligence was the collision cause for which cross-petitioners admit partial responsibility..... 9

D. The courts below have made no finding that the evidence absolves the master from personal negligence 10

II. Cross-petitioners' petition having been presented on a moot question, the writ of certiorari was improvidently granted, and should be dismissed..... 10

III. The master of a ship is legally liable for the negligence of a subordinate to whom he delegates the function of nevigating the ship on the high seas.... 11

A. The cases in this court and federal courts..... 12

B. Admiralty Rule 14 18

C. Other American cases 18

Page

D. The text writers 21

E. The question in English law..... 24

F. There are no authorities holding the master not liable 27

G. Cross-petitioners' strictures on Judge Story and the case of Denison v. Seymour are unwarranted.. 29

H. The reason for the rule that the shipmaster is liable for the negligence of a subordinate navigator of the vessel on the high seas has not ceased to exist, but is stronger under modern conditions... 32

Conclusion 37

Table of Authorities Cited

	Pages
Admiralty Rule 14, U. S. Supreme Court (254 U. S. 685).	18
Atlas, The, 93 U. S. 302	13, 29
Blaikie v. Stembridge, 6 C. B. N. S. 894, 141 Eng. Rep. 703	28
Boyens-Lewis, Das Deutsche Seerecht	36
Brown, Civil and Admiralty Law (1st Am. Ed.)	30
Buel v. New York Steamer, 17 La. Rep. 541	20
China, The, 7 Wall. 53	12
City of New York, The, 25 Fed. 149	14
Clancy v. Harrison, 4 Vict. L. R. 437 (1918)	25
Corpus Juris (Vol. 11)	21
Curtis, Rights and Duties of Merchant Seamen	21
Cyc. (Vol. 36)	21
Daret v. Gray, 12 La. Ann. 394	20
De Harde v. Magdalena, 24 La. Ann. 394	28
Denison v. Seymour, 9 Wend. (N. Y.) 11	18, 30, 31
Desty, Shipping and Admiralty	22
Foot v. Wiswall, 14 Johns. 304	20, 30
France, Code de Commerce, Art. 407	35
Furness, Withy & Co. v. Yang-Tsze Ins. Assn., 242 U. S. 430	11
Germany, Commercial Code, Sec. 527	36
Halsbury's Laws of England	25
Holland, Law of	36
Homer Ramsdell Co. v. Comp. Gen. Trans., 182 U. S. 406.	13
Howman v. Angus, 25 R. (J.) 8, 35 Sc. L. Rep. 29	26
Kay, Shipmasters and Seamen	22
Kennedy v. Ryall, 67 N. Y. 379	20
Le Blanc v. Sweet, 31 So. 766 (La.)	27
Lotty, The, 15 Fed. Cas. No. 8524	15
Maclachlan, Merchant Shipping, 6th Ed.	25
Marsden, Collisions at Sea, 8th Ed.	5

Pages

Martin v. Farnsworth, 33 N. Y. Super. Court 246, 41 How. Pr. 59 18
Maude & Pollock, Merchant Shipping, 4th Ed..... 24

Nicholson v. Mouncy, 15 East. (1812) 25

Pilotage Act of 1913 (2 and 3 Geo. 5, C. 31)..... 25

Rebecca, The, 20 Fed. Cas. No. 11,619..... 32
Roccus, Manual of Maritime Law..... 30

Saunders, Maritime Law, 2d Ed 36
Shearman & Redfield, Negligence, 6th Ed. 22
Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 508..... 11
Spencer, Marine Collisions 22
Stacpoole v. Belridge, 5 Vict. L. R. 302 (1879)..... 26
Story on Agency, 7th Ed. 21, 23

U. S. v. Farnham, 25 Fed. Cas. No. 15,071..... 13

Wilson v. The Belvidere, 30 Fed. Cas. No. 17,790..... 15
Workman v. New York City, Mayor, etc., 179 U. S. 552... 16

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vs.

HENRY WILSON, F. A. WILSON, W. T. WILSON, et al.,
Cross-Respondents.

No. 173

BRIEF FOR CROSS-RESPONDENTS IN CAUSE NO. 173.

I. THE QUESTION SUBMITTED BY CROSS-PETITIONERS FOR THE REVIEW OF THE COURT IS NOT A TRUE ISSUE OF THE INSTANT CAUSE.

Cross-petitioners submit the broad question of the legal liability of the master of a vessel for the negligent acts of a subordinate although the master be not personally negligent.

In the circumstances of this case the question is stated too broadly; for not all negligent acts of any subordinate are involved, but only the particular act of navigating the vessel, and the particular subordinate, viz., the officer to whom the master delegates her navigation on the high seas for his own convenience.

Even with this qualification we contend that the question submitted is not a true issue of the case, but is a moot question.

To present the question as a true issue, cross-petitioners have the burden of showing the following facts:

First. Absence of negligence on the part of the master.

Second. Presence of negligence on the part of the subordinate.

Third. That the alleged negligence of the subordinate constitutes the entire fault of the ship.

The record does not support these facts, or any of them. On the contrary it shows personal negligence on the part of the master; it does not show sufficiently

the presence of negligence on the part of the subordinate; and, for all that the record discloses, the fault of the ship which caused the collision may have been independent of the negligence of the subordinate, but one for which the master was responsible.

A. The Record Fails to Show That the Master Was Free From Negligence.

Cross-petitioners' pleadings admit that the *steamship "Newport"* violated three important articles of the international collision rules. (R. 31.) Her master was on board before, at, and after the collision. The prima facie presumption is, therefore, that he, as chief navigator, is responsible for the admitted negligence.

To overcome this presumption, cross-petitioners must show by a preponderance of the evidence that the admitted violations were committed without any fault on the part of the master, and that he was competent, vigilant and diligent in all respects. Does the record show these facts?

The master was called as a witness for cross-petitioners, but for the limited purpose of giving expert testimony as to alleged faults in the navigation of the other vessel. (R. 104-117.) His direct examination is silent as to what was done on board of his vessel before the collision, except to show that *he went off the bridge about twenty minutes before the collision, and that the third mate was thereafter navigating officer.* (R. 105.) The master's alleged freedom from fault is permitted to rest on the inference that the master was not at fault, because he was not on the bridge.

There is no evidence that the master's leaving the bridge, when in sight of a vessel approaching on a crossing course, throwing upon him an active and urgent responsibility, was consistent with due diligence on his part. There is no evidence that the fact that the third mate, during the crisis, was left as navigating officer, was consistent with due diligence on the part of the master; no evidence to show that the master knew the third mate to be a qualified officer; no evidence that the master, when he left the bridge, had stationed competent lookouts on watch, or a competent man at the wheel; no evidence that the master, when leaving the bridge, had given proper, or any, instructions to the officer on watch; no evidence that the master had satisfied himself of the seaworthiness of the bridge before he went below.

The record is consistent with any of the following assumptions of fact: That the master went below after he became aware of the approach of another vessel on a crossing course; that he went below without excuse or necessity; that he gave no instructions, or even wrong instructions before he went below; that he left the bridge in charge of an inexperienced and incompetent navigator, knowing him to be such; that he knew when he went below that the steering gear did not function properly; that there was an incompetent man at the wheel; that there was no lookout in position.

If the mate's navigation was in accordance with the master's instructions, the master was responsible for it; if the mate's navigation was negligent on account of failure to receive proper instructions from

the master, the master was responsible for the mate's negligence.

B. The Record Contains Affirmative Evidence of Negligence of the Master.

a. He Left the Bridge When a Vessel Approaching on a Crossing Course Was in Sight.

The master "should not leave the deck in charge of a junior officer when another vessel is approaching, so as to involve risk of collision." (Marsden, Collisions, 8th Ed., p. 451.)

The Circuit Court of Appeals found:

> "The vessels approached from converging courses and were in sight of each other from the time they were about eight miles apart. * * * There was no change of bearings from the time the vessels saw one another. The full speed of the 'Newport' was ten knots, and that of the 'Svea' seven and a half knots." (R. 239, 240.)

It was the admitted duty of the "Newport" to keep out of the way of the "Svea". To perform this duty required vigilance and a change in the navigation of the "Newport" at the proper moment. In this situation, was it proper for the navigator of this passenger vessel to leave the bridge and delegate his critical duties to a junior officer, without an excuse of the most pressing nature?

It was

> "argued by proctors for the 'Newport' that because both vessels from about 9:20 A. M. until the collision and over a distance of approximately eight miles were clearly visible to each other, and inasmuch as the bearing of the 'Newport' did not change or deviate, such facts in themselves were definite proof that the vessels would inevitably

come into collision unless one or the other modified her course or speed, * * *" (Opinion of District Court, R. 64.)

The collision occurred at 9:53. The interval between 9:20 and 9:53 is *thirty-three minutes.* The master testified that he left the bridge about 20 minutes before the collision (R. 118), say at about 9:33. From this it follows that, between 9:20 and 9:33, or *for about 13 minutes,* the vessels were clearly visible to each other. If the master, during these 13 minutes, did not see the "Svea", "clearly visible" and approaching on a crossing course, his failure to see her was negligence; if he did see her, as she approached without changing her bearing, but nevertheless left the bridge, his leaving the bridge was negligence.

There is no evidence in the record showing any excuse by the master for surrendering the navigation to any subordinate in the critical situation existing when he "left his duly licensed third officer in charge of the bridge and had gone below to his cabin some twenty minutes before the collision." (Brief for cross-petitioner, p. 3.)

b. He Delegated the Navigation, When the Danger of Collision Was Momentarily Increasing, To a Subordinate Whom He knew To Be Inexperienced and Therefore Should Have Known To Be Presumably Incompetent.

The steamer "Newport" "was an iron vessel, heavy loaded, carried a large number of passengers and a large crew." (Claimant's answer, R. 32.)

What is the duty of a master of such a vessel, *assuming* that he had a proper excuse for leaving her bridge in the situation above described?

His duty is clearly, to place in charge of the navigation an officer whom he knew to be experienced and competent to handle the exacting situation then existing, and to give him proper instructions before going below.

The record contains no evidence to show that the third mate who was left on the bridge was either experienced or competent, but indicates by inference that he possessed neither of those qualifications; it also shows by inference that the master left his post without giving any instructions of any nature; and it shows directly that the master's selection of his delegate for the navigation was grossly negligent under the circumstances.

The following testimony appeared on his cross-examination:

> "Q. You gave some instructions to your officers about standing watch on the bridge, did you not?
>
> A. *This young man was just keeping his first watch on ship; he just shipped the day before, and was making his first voyage.*" (R. 118.)

The inference from this testimony is that either the master went below without leaving any instructions, or he does not care to disclose what were the instructions given to the inexperienced young man. In either case a finding of negligence would be justified. But clearly the delegation of the duty to navigate the passenger vessel, while approaching a critical and exacting situation, to a young man of the description given by the master is negligence *per se*.

It should also be noted that, if any inferences deducible from the omission of testimony in this case do not correspond with the facts as they actually occurred, cross-petitioners had the means of showing the facts; for both master and third mate were on the witness stand, but cross-petitioners considered it more helpful to their case to take the position that

> "There is no need of discussing or going into what she was doing at all." (R. 101.)

We submit that, in order to raise an issue predicated upon the diligence of the master, it was necessary for cross-petitioners to go into what the vessel, her master, her third mate, her lookout, if any, her helmsman and others were doing during the critical half hour before the collision.

C. The Record Fails to Identify the Admitted Fault of the Ship With Any Negligence of the Subordinate.

a. The Record Does Not Show Any Specific Negligence of the Third Mate.

He was the navigating officer during the last twenty minutes before the collision. His testimony was available to cross-petitioners (R. 147-148); but cross-petitioners preferred not to examine him. A proper inference is that his testimony would have been harmful to cross-petitioners' case. The court is invited to infer his personal negligence from a blanket admission that the ship was negligent in her navigation, and the fact that he was left on the bridge for twenty minutes. If he received instructions from the master to go ahead and cross the bow of the approaching "Svea", it cannot be said that he was personally negligent; if he

gave the proper orders to avoid the "Svea", but the steering gear or the telegraph of the "Newport" were out of order, he was not personally negligent. Either of the suggested eventualities are consistent with an admission of fault by the "Newport" and the absence of evidence as to what happened on the bridge.

b. Assuming Negligence on the Part of the Third Mate, There is no Evidence That Such Negligence Was the Collision Cause for Which Cross-Petitioners Admit Partial Responsibility.

The fault of the ship may have consisted of the mate's negligence *plus other faults for which the master is responsible.* If this assumption is wrong, cross-petitioners had the means to prove its incorrectness by producing the master, his third mate and quartermasters (R. 120-1), but preferred to leave it doubtful whether there was any one on the bridge of the "Newport" immediately before the collision. (R. 101.) One instance of another possible fault than the suggested negligence of the mate, a fault which is consistent with the record as it stands, and for which the master would be responsible, is: That the master, before leaving the bridge, gave wrong instructions to the mate, rules or no rules. That he has more respect for his own opinions than for rules or regulations is proved by his own admission when he testified as an expert navigator against the "Svea":

> "When they get within a half a mile they ought to do something, *notwithstanding any rules or regulations of what a man has to do.*" (R. 117.)

D. The Courts Below Have Made No Finding That the Evidence Absolves the Master From Personal Negligence.

In the opinion of the District Court (R. 63-8) the question of the master's liability was not discussed, but the decree was against "the steamship 'Newport', her engines, boilers, tackle, etc., George McKinnon, master of said vessel, and Pacific Mail Steamship Company, a corporation."

The Circuit Court of Appeals affirmed that part of the decree making Captain McKinnon personally liable. (R. 249.) The court, however, made no reference to the evidence bearing upon the question of the master's personal negligence, nor did it make any finding.

Referring to cross-petitioners' contention that the decree holding the master of the "Newport" personally liable is erroneous, the Circuit Court of Appeals said:

> "ACCEPT IT that the evidence excuses the master from personal negligence and the question is, should he be held responsible for the negligence of his subordinate officer, * * *" (R. 244.)

II. CROSS-PETITIONERS' PETITION HAVING BEEN PRESENTED ON A MOOT QUESTION, THE WRIT OF CERTIORARI WAS IMPROVIDENTLY GRANTED, AND SHOULD BE DISMISSED.

Cross-petitioners' application was presented on "the issue of the individual liability of the master for the negligence of a subordinate." (Cross-petition, p. 2.) If the court is satisfied with our showing that this is not an issue arising under the facts of this case, but is an issue erroneously injected into it by cross-peti-

tioners, the writ of certiorari was granted under a misapprehension and should be dismissed.

In *Furness, Withy & Co. v. Yang-Tsze Ins. Ass'n,* 242 U. S. 430, the court held that whenever in the progress of the cause facts develop which if disclosed on the application would have induced a refusal, the court may dismiss the writ.

See also *Southern Power Co. v. North Carolina Public Service Co.,* 263 U. S. 508.

The instant case is one where these principles should be applied and cross-petitioners' writ be dismissed.

III. THE MASTER OF A SHIP IS LEGALLY LIABLE FOR THE NEGLIGENCE OF A SUBORDINATE TO WHOM HE DELEGATES THE FUNCTION OF NAVIGATING THE SHIP ON THE HIGH SEAS.

The question submitted to the court is confined to the responsibility of the shipmaster for the negligence of a subordinate to whom the master has delegated his principal function on the high seas, viz., the navigation of the ship. This question was not put in issue in the District Court, but was raised by cross-petitioners for the first time on appeal to the Circuit Court of Appeals, which *assumed* that the evidence absolved the master from personal negligence. Inferentially it was also assumed by that court that it was not negligence in the master to leave the bridge in charge of the third mate after a vessel, plainly visible, had been approaching for thirteen minutes on a crossing course.

The principle upon which the question depends is not so much whether the actual negligence is that of the master personally, or that of a subordinate. The principle is, in the language of this court in *The China,* 7 Wall. 53, 69:

> "Whether the party charged is liable or not, aside from the merits, depends in all cases upon *his relations to the wrongdoer.* If the wrongful act was done by himself, or was occasioned by his negligence, of course he is liable, and *he is equally so, if the act constituting the fault was done by one towards whom he bore the relation of principal,* * * *" *

Off-hand it would seem clear that not only in fact, but also on principle, and in the law, the master, and not the owner, is the principal in the navigation of the vessel on the high sea, and that the mate whom the master places in temporary charge of the navigation is the master's agent. Furthermore, there are potent reasons of policy why the responsibility for the proper navigation of the ship should at all times rest upon the master. This court has several times expressed its opinion on this question, always directly contrary to cross-petitioners' present contention.

A. The Cases in This Court and Federal Courts.

In *The China,* 7 Wall. 53, 68, the court said:

> "The maritime law as to the position and powers of the master, and the responsibility of the vessel, is not derived from the civil law of master and servant, nor from the common law.

*Italics ours.

It had its source in the commercial usages and jurisprudence of the middle ages."

In *The Atlas*, 93 U. S. 302, 311, the court said:

"Beyond all doubt, the owners of a ship or vessel injured by collision may proceed to recover compensation either against the owners, or against the master personally, or against the ship herself, at their election. *The Volant*, 1 W. Rob. 387; Maude & P. on Ship. (3d ed.) 466.

Argument to support that proposition is unnecessary, * * *"

In *Homer Ramsdell Co. v. Comp. Gen. Trans.*, 182 U. S. 406, 416, the court, speaking by Mr. Justice Gray, cited approvingly the following statement by Mr. Justice Story in his Treatise on Agency, (2d ed.) Sec. 456a.

"*The master* of a ship, and the owner also, is liable for any injury done by the negligence of the crew employed in the ship. The same doctrine will apply to the case of a pilot, employed by the master or owner, by whose negligence any injury happens to a third person or his property; as, for example, by a collision with another ship, occasioned by his negligence."

It may be argued that these are dicta of the court in the cases cited; but, if correct, they are decisive of the present question. We believe them to be in line with principle, with public policy, and the authorities elsewhere. If the master is liable for injuries done by the negligence of a pilot, *a fortiori* he is liable for injuries done by the negligence of a mate.

In *U. S. v. Farnham*, 25 Fed. Cas. No. 15,071, the question was:

> "Was it the duty of the master to see to the state of the boiler, or that proper precautions were taken to relieve it from the pressure of steam when the boat was running or had stopped, or did that duty belong exclusively to the engineer?" (p. 1044.)

Judge Betts instructed the jury as follows:

> "The master is commander-in-chief. The law entrusts him with the control of the vessel and of every department of service on board; and the engineer has no more right to refuse obedience to his orders than has the mate. The captain is charged with responsibility for the right performance of all duties which appertain to the command and management of the propelling power of the vessel. *If there be misconduct or neglect in the engineer's department, the captain is, by the maritime law, responsible civilly,* and, by this statute, criminally for the consequences. * * * the master has supreme command in all respects, in directing the navigation of the boat, * * * He is responsible for every misuse or neglect of that authority, * * * if he omits to interpose and suppress the danger. He is bound to see that all persons under his command do their duty properly; * * *" (25 Fed. Cas., 1044-45.)

If this principle is correct in cases of negligence in the engineer's department, *a fortiori* in a case of negligence in navigation, the master's principal function.

In *The City of New York,* 25 Fed. 149, 151-2, a collision case, Judge Addison Brown said:

> "In modern maritime law, so far as I can discover, the liability for injuries through negligence is confined to the owners of the ship *and to the master, who is responsible for all his subordinates that are appointed by him and are under*

his control (Story, Ag. 314, 317), *and that is the general rule in English and American law.* * * * By the English and American maritime law the master is responsible for the loss of cargo equally with the owners, without reference to any personal fault of his own, but by reason of his accountability for the acts or omissions of his subordinates, *as a kind of subrogated principal,* says Story, and qualified owner."

In *The Lotty,* 15 Fed. Cas. No. 8,524, it was held that the master of a vessel is responsible for the negligence of a licensed pilot in securing her improperly to the wharf. Judge Betts said:

> "No law or port regulation has been shown subjecting the master to the authority of the pilot in respect to the position or fastenings of his vessel after she is brought into port, and consequently the *master,* equally with his owners, is *responsible for damages occasioned through ignorance, negligence or want of due precatuion in the pilot* in this service." (15 Fed. Cas. p. 934.)

In *Wilson v. The Belvidere,* 30 Fed. Cas. No. 17,790, the court, referring to the relative duties of master and mate, said:

> "He (the mate) must exercise a general superintendence under the master, over the whole business; and if any special directions are given, he must obey them; where none are given, he must use common care and discretion, according to the best of his judgment; *but he is not solely answerable for casualties.* Masters often attempt to fix the sole responsibility on mates, to screen themselves, who, of all others, should constantly exercise the most care, and marked attention. *If their engagements in other duties, or their avocations, throw on the mates the executive duties, they being (though approved by the owners) selected by the masters, and their deputies, the masters must*

> *share responsibilities when casualities occur."* (30 Fed. Cas. p. 107.)

This language applies with particular force where, as in the instant case, the master expressly delegated to the mate the function of navigating the vessel. In navigational matters the master has a unique responsibility, even greater than the owner; he is not, as cross-petitioners argue, a mere "intermediate servant."

In *Workman v. New York City, Mayor, etc.,* 179 U. S. 552, libelant, owner of the barkentine "Linda Park", injured in collision with a fireboat owned by New York City, sued *in personam* the mayor, the fire department of New York, and one Gallagher, captain of the fireboat.

The district judge held that "the running into the Linda Park arose through lack of reasonable prudence, and was unnecessary and negligent." (179 U. S. 555.)

The Circuit Court of Appeals, affirming the decree against Gallagher, said:

> "The evidence in the record adequately supports the conclusion of the court below that the injuries caused to the libelant's vessel by the impact of the fireboat were caused by *the negligent management of the fireboat* while the latter was trying to reach a convenient location to play upon a burning building near the pier at which the libelant's vessel was moored." (179 U. S. 555.)

This court said:

> "There is no substantial controversy raised on the record as to the premise of fact upon which

> *the personal decree against Gallagher* was rendered by both the courts below. * * * It is clear that if it was seriously claimed that both the courts below had manifestly erred in their appreciation of the facts as to *negligence in the management of the fireboat*, the testimony would not justify the assertion." (179 U. S. 555.)

From this case it would appear, therefore, that *negligence in the management of the colliding ship* is a sufficient legal basis for a personal decree against her master, and that the personal negligence of the master is not a necessary factor; for no personal negligence of the captain appears in the record of this case.

The brief for cross-petitioners refers to only two of the foregoing cases, viz., *The City of New York*, and *Wilson v. The Belvidere.*

Referring to the former case, cross-petitioners say:

> "The City of New York, 25 Fed. 149 (1885) is based on *Story* and apparently on that basis alone gives it as the general rule in English and American law that the master is liable for the tortious acts of his subordinates." (Brief for cross-petitioners, p. 18.)

In the case cited "the master was below, and was not in any personal fault." (25 Fed. 151.)

In *Wilson v. The Belvidere* the langauge cited above was used by the court incidental to "inquiries into the appropriate and respective duty" of the master and mate of a vessel.

B. Admiralty Rule 14.

The liability of the master in question, and the corresponding right of third parties injured by negligence in collision cases, is recognized by this court in the "Admiralty Rules of Practice, promulgated December 6, 1920. By Rule 14, (254 U. S. 685) the libelant may proceed in all suits for damage by collision, *in rem* against the ship and/or *in personam against the master* and/or the owner."

C. Other American Cases.

In *Martin v. Farnsworth,* 33 N. Y. Super. Court 246; 41 How. Pr. 59, the court, discussing the responsibilities of master and pilot, said:

> "In one of the oldest treaties (treatises) upon maritime law, a copy of which is to be found in the appendix to second volume of Peter's Admiralty Decisions, the power and responsibility of a master of a vessel are thus defined:
>
> " 'A master of a ship is one who for his knowledge in navigation and for his fidelity and discretion hath the government of the ship committed to his care and management.
>
> " 'The law looks upon him as the officer who must render and give an account for the whole charge, when once committed to his care and custody, and if misfortunes happen through negligence, wilfulness, or ignorance, of himself *or his mariners,* he must be responsible.' " (33 N. Y. Super. Ct. 260-1.)

In *Denison v. Seymour,* 9 Wend. (N. Y.) 11, the master was sued for damages arising out of a *collision which occurred while the master was below.* The ves-

sel was in charge of a pilot employed by the owners. The court said:

"Were this action against the master of a vessel engaged in the merchant service, it seems to be *conceded by all the cases that he would be liable.* In such cases, *the master is responsible for the diligence of all to whom is entrusted the management of the vessel.* * * * A steamboat for the transportation of passengers with their baggage, and for carrying small freight, *is* a merchant vessel; and *though the pilots are appointed by the owners, and not by the captain,* yet the captain is a volunteer in that service, in the language of Lord Ellenborough. The steamboat service is not like the naval service of a nation. No captain is bound to engage as such; he has a choice whether he will serve such persons as the owners choose to put on board as officers. He knows the responsibility of master of a vessel, and if he is unwilling to be responsible for the negligence of the subordinate officers, he is under no compulsion to serve there himself. If he accepts the office of master of the vessel he does so with the knowledge of the responsibility which as such he incurs. If the owner of a merchant ship were to stipulate with the master that he should take certain persons for his mates, that, I apprehend, would not alter his responsibility to third persons, however it might affect his responsibility to the owner.

"On the whole, I am of opinion that the fact of the pilot being chosen by the owners does not alter the law as to the captain's responsibility. Suppose the owners should contract, not only with the pilots, but with all the hands on board, through the agency of some other person besides the captain, as they probably do, would the captain therefore become entirely irresponsible? and must any one whose vessel has been run down, where a totally irresponsible person was at the wheel, bring his suit against a common sailor? The owners of a vessel may not be known; they

> may be residents of a foreign country. It would be adding insult to injury to say to a man, whose property had been destroyed, that he has his remedy against a common sailor, or the owners who perhaps live in Europe. My opinion is, that the master of a steam-boat is liable like the master of a merchant ship; and that the circumstance of the pilot's being appointed by the owners does not discharge that liability, so far as third persons are concerned." (9 Wendell, pp. 12, 16-17.)

In *Kennedy v. Ryall,* 67 N. Y. 379, the master was sued for damages for the death of a passenger who was poisoned while the vessel was being fumigated by the health authorities. The negligence charged was the failure of the steward of the vessel to remove the poison used from the steerage. The court said:

> "The question how far a master of a vessel is answerable for damages arising by reason of the negligence of those employed under him, lies at the foundation of this action.
>
> * * * * * * * *
>
> "By a *rule peculiar to the mercantile law, the master is liable for the negligent acts of an employe,* while engaged under his authority, to the same extent as if he were the ultimate principal, who is ordinarily bound to respond in damages for such negligence. (Shear & Redfield on Neg., Sec. 113.)" (67 N. Y. p. 382.)

Cross-petitioners admit that the following authorities also hold the master liable, although free from fault:

Foot v. Wiswall, 14 Johns. 304;
Buel v. New York Steamer, 17 La. Rep. 541;
Daret v. Gray, 12 La. Ann. 394.

It is true that there are few decided cases, but this is not astonishing with reference to a question which this court, in *The Atlas,* supra, considered settled *"beyond all doubt",* when applied to injuries by collision.

D. The Text Writers.

The rule is stated in *Cyc.* as follows:

> "The captain or master of a vessel has control of every department of service on board, and it is *his duty personally to see to the course of his vessel, and to see that the officers and crew under him properly perform their assigned duties in respect to the navigation of the vessel,* even in local waters where the vessel for the time being is in charge of a local pilot, *and if there is any misconduct or neglect he is responsible civilly,* and under some statutes criminally, for the consequences." (36 *Cyc.* 132.)

And again:

> "The master of a vessel is ordinarily liable for the acts of all persons under, or supposed to be under, his command while engaged about their ordinary duties as subordinate officers of the vessel, or as seamen." (36 *Cyc.* 150.)

In 11 *C. J.* 1172 (*"Collision"*) the rule is stated as follows:

> "Provided he is in actual command at the time of the collision, * * * the master of a vessel is liable for damages."

Story on Agency, 7th ed., sec. 313, extensively discussed with disapproval in brief for cross-petitioners.

Curtis, Rights and Duties of Merchant Seamen:

> "The master is personally liable for his own negligences, non-feasances and misfeasances. *He*

is also liable for those of his officers and crew, though no personal fault or negligence is imputable to him. The rigor of the law in this respect arises from *reasons of public policy,* and does not admit of any distinction whether the officers and crew are appointed by the master himself, or by the owner." (pp. 204-5.)

Spencer, Marine Collisions:

"The party injured by collision may not only look to the vessel inflicting the damages to the extent of its actual value, and to its owners to the extent of their interest in the vessel, but he may hold the master of the vessel liable. *The master is not only responsible for his own conduct, but also for the acts of his crew."* (Sec. 182.)

"He is the personal representative of the owners, and in their stead has authority to obligate the ship and *is personally responsible for its navigation."* (Sec. 184.)

"The master of a vessel, when in command and directing its movements, is treated as a vice-principal of the owner." (Sec. 184.)

Sherman & Redfield, Negligence, 6th ed.:

"The master of a private ship is responsible to third persons for his own negligence to the fullest extent *and for the negligence of all employed on board to the same extent as if he were the ultimate principal."* (p. 246.)

Desty, Shipping and Admiralty:

"He, (the master) is liable to third persons for acts or negligence of persons employed in the navigation of the vessel." (p. 119.)

Kay on Shipmasters and Seamen:

This leading English writer says, with reference to the point made by cross-petitioners, that the action for negligence should be brought, either against the

principal, or against the immediate actor in the wrong:

> "Masters of ships, however, form an important exception to this rule.
>
> "Although they are the agents, or servants of the ship owners, they are also, in many respects, deemed to be responsible as *principals,* to third persons, not only for their own negligences, nonfeasances and misfeasances, but also *for the negligences, nonfeasances and misfeasances of the subordinate officers and others* employed by and under them." (Citing *Story on Agency,* 314.) (Vol. 2, pp. 1153-4.)
>
> "So, if the pilot leaves the deck for a few minutes, having given directions to the second mate for the sailing of the ship during his absence, and a collision takes place through the default of the mate, and the pilot returns before the collision takes place, but too late to prevent it, *the master* and owners are liable." (Vol. 2, p. 791.)

This author states that this rule is supported by two independent reasons: First, the doctrine of the maritime law which treats the master as an "inferior principal"; and, second, public policy:

> "This liability is founded upon the doctrine of the maritime law, which treats the master, not merely as an agent, * * * but also in some sort, as an *inferior principal* and as a *qualified owner* of the ship, possessing for the time the *executive power.*
>
> "And his liability * * * extends * * * to his own negligences, nonfeasances and misfeasances, *and to those of his officers and crew.*
>
> "This great responsibility has also this reason for its support; it induces the master to exercise greater watchfulness over the acts and conduct of the officers and crew. If he were not so liable,

he might often, by his connivance in their frauds, misfeasances, negligences or nonfeasances, subject the shippers of goods, as well as the owners of the ship, to great losses and injuries, without their having any adequate redress. The policy of the maritime law has therefore indissolubly connected the master's personal responsibility with that of all the other persons on board, who are under his command and are subjected to his authority." (Vol. 2, p. 1154.)

E. The Question in English Law.

In spite of the statements in *Kay*, the leading text on the subject in England, cross-petitioners state: "The law of England is assuredly contrary."

But this is an error. In *Maude & Pollock, Merchant Shipping* (4th ed.) the distinguished author states:

> "As the master is not merely an ordinary agent, but to some extent, and for some purpose, the owner of the ship for the time being, his acts not only bind his principal, as those of an ordinary agent, but he is personally bound by them. * * * *He is also usually liable for all acts of negligence or misfeasance on the part of the crew,* by which the cargo or the property of others is injured. But he is not liable for trespasses committed by them wilfully, or for acts done beyond the scope of their ordinary employment; nor does the ordinary rule with reference to the master's liability apply to the captain of a Queen's ship, who has no power of selecting his officers and crew." (p. 154.)
>
> "To this general statement of the duties of the mariners it must be added that they are, in many senses, as has been said by Molloy, '*the servants of the master, for whose miscarriages he must answer,* and whom he may correct as the usage is at sea'." (p. 178.)

The Pilotage Act of 1913 (2 and 3 Geo. 5, C. 31; *Maclachlan, Merchant Shipping,* 6th ed. p. 211) provides as follows:

> 15 (1) "Notwithstanding anything in any public or local Act, the owner *or master* of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the vessel *or by any fault of the navigation of the vessel* in the same manner as he would if pilotage were not compulsory."

The passage cited in cross-petitioners' brief (p. 24) from *Halsbury's Laws of England* does not support cross-petitioners' contention. Granting that the master "is not liable for the damage done by an act of the crew or of the pilot * * * *unless ordered by him*", the act of the third mate in the instant case, which caused the collision, was an act ordered by the master, viz., the navigation of the "Newport".

In *Nicholson v. Mouncey,* 15 East. 384 (1812) Lord Ellenborough held that the master of a merchant ship is answerable for those whom he employs for injuries done by them to others within the scope of their employment.

The Australian case of *Clancy v. Harrison,* 4 Vict. L. R. 437 (1878), cited by cross-petitioners (Brief p. 25) was one where the ship was not being navigated, but was moored and the crew were painting the yards. While so engaged, one of the crew dropped a piece of iron on plaintiff, and the court held that the master was not liable for plaintiff's injury. It is not the case of a crew at sea. The negligent member of the crew was not engaged in doing the master's work, nor even engaged in a maritime occupation.

Had cross-petitioners extended their search one year beyond the *Clancy* case, the discovery would have been made that in a *collision* case arising in the same jurisdiction the Supreme Court of Victoria said:

> "So in cases of *collision,* it is necessary that the *master* should guide and control the ship; and if the *ship* is improperly controlled and guided, or unskilfully handled, and any one thereby injured, *the master is liable.*"
>
> *Stacpoole v. Belridge,* 5 Vict. L. R. 302 (1879).

The extent to which the liability of the master for acts of subordinates has been carried in English courts is illustrated by the case of *Howman v. Angus,* 1897, 25 R. (J.) 8; 35 Sc. L. Rep. 29. There a local law forbade the moving into the district of any horse, except on production of a veterinary inspector certifying that each horse was not affected with strangles. Ponies were landed from a ship in contravention of the law, the discharge being made by the *mate.* It was argued before the court that the landing was the duty of the mate, and that the captain was not responsible. But the court held, that the *master* was responsible for the act of the mate in landing the ponies without production of a certificate from a veterinary surgeon that they were free from disease. Lord Traynor said:

> "I have no doubt whatever that the offense was committed by the captain of the vessel. The captain is not in the ordinary sense the man who receives cargo or unloads it. That is generally the mate's duty. *But the mate acts only as the subordinate of the captain, and the captain is responsible for all that is done in loading or unloading or navigating the vessel.*"

F. There Are No Authorities Holding the Master Not Liable.

Cross-petitioners state:

> "There are three cases in one state, New York, and one Federal District Court case holding a master liable." (Brief for Cross-Petitioners, p. 25.)

We have shown above that the weight of authority in favor of our contention is far greater than is admitted or realized by cross-petitioners.

Cross-petitioners then state:

> "The authorities in Louisiana, England and Australia are contra," (p. 25)

and attempt proof of this statement on pages 20-25 of their brief.

Examination of the "authorities" cited will show that cross-petitioners are in error; that, on the contrary, there is no authority in Louisiana, England or Australia which fairly supports their contention.

Cross-petitioners admit that two Louisiana cases, cited by them on page 8 of their brief, hold the master liable, but contend that "the two Louisiana cases above referred to are overruled, we think, by the case of *Le Blanc v. Sweet,* 31 So. 766 (La.)". (Brief p. 20.)

That the latter case, however, does not intend to overrule the preceding cases follows from the following facts:

1. The preceding cases are not even mentioned. If the court had had any intention to reverse an established rule of law, it would certainly have discussed the former cases supporting the rule.

2. It does not appear that the question of the legal liability of the master as such was an issue in the case.

3. The facts show that the party sued and referred to in the words: "Under these circumstances we find no reason for holding the latter liable" was in the engine-room of the river boat, obeying the signals of the pilot directing the navigation from the deck. He was not the principal in the navigation, and did not act as master.

In the other case cited by cross-petitioners, *De Harde v. Magdalena* (Brief, p. 21) the vessel was under command of the harbor master; the master sued was not even on board.

It is quite safe to say that the law of Louisiana, making the chief navigator of a vessel liable for the negligence of subordinates in the navigation, remains unchanged.

Cross-petitioners' effort to show that the law of England "is assuredly contrary" is equally unsuccessful. Reliance is placed upon *Blaikie v. Stembridge,* discussed on pages 21-23 of the brief.

In that case the question is, whether the master of a ship is liable for the negligence of a stevedore appointed by the *charterer.* Of course the master was held to be not liable. The stevedore is an independent contractor, in a different position from that of a subordinate to whom the navigation of the ship is delegated. The court simply refused to hold the master liable "without any wrong done by the master OR CREW". The case is impliedly an authority supporting our contention that, *if* there is a wrong done to a

third party by the *crew,* the master would be held liable under the English law.

This case, as the ones previously cited, show the error of cross-petitioners in claiming that the authorities in England are contra to our contention. We may here recall that the Supreme Court, in *The Atlas,* supra, cited English authorities to support the rule settled "beyond all doubt".

We have already shown supra that the law of Australia, in collision cases, is in favor of our contention.

G. Cross-Petitioners' Strictures on Judge Story and the Case of Denison v. Seymour Are Unwarranted.

The long discussion involving the responsibility of innkeepers, stablekeepers and other custodians of property, in the Roman and common law, is out of place and it would not be profitable to show that cross-petitioners may be mistaken in their criticisms of Judge Story's imperfect deductions from Justinian and other ancient texts.

Judge Story is certainly correct in stating that the "exception to the general rule" referred to on page 10 of cross-petitioners' brief *is adopted in the general jurisprudence of the modern commercial nations of continental Europe,* and that is sufficient. The addition: "it having been derived from the same common source—the Roman law" may be incorrect, if by Roman law is understood "the Digest of Justinian". However we believe the addition to be correct in its wider sense.

When the emperor Antoninus was petitioned by a shipwrecked subject, he answered: "I am, it is true, the sovereign of the world, but the law is the sovereign of the sea; let this matter be determined by the Rhodian *maritime* law * * *" (Roccus, Maritime Law, preface IX; page 49, footnote.)

In *Roccus' Manual on Maritime Law* it is stated (p. 57):

> "Note LIX. The master is culpable if he commit the care of the ship to improper hands. If the vessel and cargo therefore perish, or the goods are lost from the incapacity of the crew, because the mariners were unskilful and inexperienced, *the master is always liable;* for he ought to be careful in the choice of sailors, or he will be responsible himself."

In *Brown's Civil and Admiralty Law* (1st American Edition 1840), Vol. II, it is stated (pp. 133-4):

> "The master of a ship doth not, by being constituted master, acquire any property therein, either general or special; he is only considered as an officer, who must render and give an account for the whole charge, when once committed to his care and custody; and upon failure to render satisfaction; and, therefore, if misfortunes happen, if they be either through negligence, wilfulness, or ignorance of himself *or his mariners,* he must be responsible."

The cases cited by Story are *Denison v. Seymour* and *Foot v. Wiswall.* Cross-petitioners admit that they "support the statement of the text" in Story on Agency. This would be sufficient to make the text authoritative, provided that these cases lay down the correct rule of law. Cross-petitioners do not appar-

ently deny that it *was* the rule at the time. The court said:

> "It seems to be conceded by all the cases that he would be liable." (*Denison v. Seymour,* supra.)

But cross-petitioners argue that the rule should be changed because the reason given for it in the *Denison* case is fallacious.

We submit that even if it were true that the court, in the *Denison* case, had assigned a specific reason for the rule, which reason may be fallacious, that fact would not be sufficient to require a new rule, provided the rule is supported by some good reason. It would extend this brief unduly to discuss the potency of all the reasons which could be invoked to defend the rule. We think the simple reason of *public policy,* frequently given by courts sustaining the rule, quite sufficient for its support. When the cases cited by us were decided, it was good public policy to consider the shipmaster the principal in the navigation of the ship, and therefore responsible to third parties for all navigational acts and omissions, whether they were committed by him personally or by those to whom he delegated his duty as chief in the navigation. We shall show that under modern conditions a wise public requires this rule to be maintained *a fortiori.*

H. The Reason for the Rule That the Shipmaster is Liable for The Negligence of a Subordinate Navigator of the Vessel on the High Seas Has Not Ceased to Exist, But is Stronger Under Modern Conditions.

Cross-petitioners argue that the considerations which warranted the imposition of the liability in question are not present under modern conditions of ship operation, and that consequently the authorities applying the rule should not be followed.

This argument is based upon an attempted showing that the modern master has become a mere stipendiary agent of the owners, whereas formerly he was "the chief and the acting and responsible head of a maritime adventure"; that this fall of the shipmaster from his high estate was recognized by Judge Ware in *The Rebecca* (20 Fed. Cas. No. 11,619), in 1831, even before Judge Story wrote his classical work on Agency in 1839; that Judge Story was therefore remiss in overlooking so significant a change, which should reverse the ancient rule.

An examination of the *Rebecca* case will disclose, however, that the extract from Judge Ware's opinion cited and relied upon by cross-petitioners applies to the shipmaster's liability *ex contractu*, and not to the liability here in issue, viz., the liability of the master *ex delicto*. Following immediately after the extract cited by cross-petitioners is a discussion by Judge Ware of the liability of the shipowner for the tortious acts of the master. Certainly this discussion is more enlightening than the utterly irrelevant statement cited. We quote:

> "Another principle, equally universal, is, that no one is responsible for the wrong done by an-

other, unless he is particeps delicti. *A person participates in the act when he authorizes or commands it to be done.* He may also be said to participate in the act *when it is done by one who is subject to his authority, and whose actions it is his right and duty to control;* as a parent or master is responsible for the wrongful acts of his children or servants, when he has the power of preventing them, and does not. He having the right and the power, and the law imposing it upon him as duty, he is justly considered as *authorizing the wrong which he does not prevent.* Faults, like crimes, are in their own nature personal, and are not imputable except to the person who commits them, and upon the principles of natural law the fault of one person can never be imputed to another unless he was under an obligation to prevent it. *But the positive jurisprudence of all countries extends this vicarious responsibility, upon principles of public policy, further than is strictly warranted by the precepts of natural law.* And the doctrine is stated by elementary writers, that *the principal is responsible generally for the wrongful acts of the agent, done in the execution of the proper business of the agency.*" (20 Fed. Cas. p. 380.)

Applying the principles to the instant case, it follows that the master participates in the act of navigation when he authorizes or commands the mate to navigate the vessel. The act of navigation is then performed by one who is subject to the master's authority, and whose actions it is the right and duty of the master to control. If the mate is negligent, the master authorizes the negligence which he does not prevent. The positive jurisprudence of all countries extends this vicarious responsibility of the master upon *principles of public policy* further than may be strictly warranted by principles of natural law. The

master, being the principal in the navigation is responsible for the wrongful acts of the mate, the agent to whom he delegates the navigation, while done in the execution of the business of navigating.

It is absurd to think of the master as a "stipendiary agent" relative to *navigation*. Hence all the deduction based upon the master's character as a stipendiary agent, while they may be proper in some contractual affairs, cannot properly apply to negligent navigation.

Cross-petitioners' contention that "the master today is little more than a navigator" (Brief p. 28) seems to us inconsistent with the other contention that he is a "stipendiary agent"; but accepting it that he is little more than a navigator, he still holds a powerful and responsible position while navigating on the high seas. The safety of the ship, her cargo, her passengers, and the safety of other ships, cargoes and lives depend upon his judgment and diligence. His responsibility as director of the navigation, his power to do harm, is far greater now that ships are costlier, larger and more numerous than it ever was. His responsibility for the proper navigation is exclusive of that of the owner of the ship; for the latter knows that if he interferes with the navigation he loses, in case of accident, the benefit of valuable legislation, such as the Limitation of Liability Acts, and the Harter Act. He is the principal in the navigation, the "superior", and it is meet that he should be burdened with the obligation implied in the word "respondent". He controls the movements of the modern steamship on the high seas more exclusively than the conductor controls the train on land; for the latter divides the

control with the engineer, whereas the engineer of the steamship executes in the engine-room the commands of the master from the bridge. The shipmaster has the right to command the movements of the ship and to control the persons employed upon it; he is not merely a fellow servant with the other employees, or an intermediate servant, in the navigation, but the principal. The imposition of a responsibility commensurate with his power and corresponding inability to unload the responsibility upon the shoulders of subordinates will not only insure greater care in the selection of shipmasters, but will also insure greater diligence in the performance of their duties. The consequence will be that it will give greater security to the owner of the ship, to the crew, to the cargoes carried in her, to the lives of her passengers, and to other ships, properties and lives moving upon the high sea.

It could not be claimed seriously that a rule having such a result is harsh, or unjust, or not consonant with natural law and sound public policy.

The fact that the enactments of other maritime nations make shipmasters liable for the tortious acts and for the omissions of their subordinates has a bearing upon the question, whether there is a sound public reason for the doctrine that the shipmaster is liable for the negligent, and other tortious acts of his subordinates; we therefore subjoin a few of these enactments:

The law of *France* makes the master liable for the faults of the crew. (Code Civil, art. 1382-1384; Code de Commerce, art. 407; Valroger, Le Droit Maritime.)

Art. 216 of the Code de Commerce, defining the owner's liability, continues:

> "He can in any case free himself from the above named obligations by the surrender of the vessel and the freight. However, the right of surrender is *not* permitted to a party who is both *master* and owner or part owner of the vessel." (Translated in *Saunders, Maritime Law,* 2nd Ed., p. 445.)

The law of *Germany:* Commercial Code, sec. 527, provides that the master *cannot delegate the navigation* of the ship without personal liability to other persons (except in case of compulsory pilotage). (*Boyens-Lewis, Das Deutsche Seerecht,* vol. 1, p. 315.)

The law of *Holland:*

> "534. When a ship through the default of her commander *or crew* runs down, fouls or comes into collision with another, and does damage to her, the whole of the damage sustained by the ship and the goods on board her must be made good by the *commander* of the ship which has caused the damage. * * * The commanders must make good the loss sustained by the owners of the ships and goods and preserve their right to recover over from the officers and crews if these persons are to blame." (Translated in *Saunders, Maritime Law,* 2nd Ed., p. 447.)

In the laws of *Denmark, Norway, Spain, Mexico, Chile* and *Brazil,* the master seems to be personally liable for thefts and other injuries committed by the crew. (See 2 Boyens-Lewis, Das Deutsche Seerecht, p. 374.)

These illustrations refute cross-petitioners' argument that the responsibility of the shipmaster for

defaults of his subordinates is antiquated and has no place in modern maritime life.

CONCLUSION.

We believe that we have fairly shown that the authorities in English and American law relative to the liability of a shipmaster for navigational torts of subordinates are not in conflict; that there are sound reasons for these authorities, and that the change in the rule advocated by cross-petitioners would be in conflict with sound public policy.

The judgment against cross-petitioner McKinnon should be affirmed, with costs to cross-respondents.

Dated, San Francisco,
November 25, 1927.

Respectfully submitted,

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